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CASES DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS

FOR THE

Eighth Circuit.

REPORTED BY

JOHN F. DILLON.

THE CIRCUIT JUDGE.

VOLUME V.

DAVENPORT, IOWA:

EGBERT, FIDLAR, & CHAMBERS.

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JUDGES

OF THE

United States Circuit Courts

FOR THE

EIGHTH CIRCUIT.

HON. SAMUEL F. MILLER, LL. D., Supreme Court Justice assigned to the Circuit.

HON. JOHN F. DILLON, LL. D., Circuit Judge for the Circuit.

DISTRICT JUDGES.

HON. RENSSELAER R. NELSON, Minnesota.
HON. JAMES M. LOVE, Iowa.
HON. SAMUEL TREAT, Eastern District Missouri.
HON. ARNOLD KREKEL, Western District Missouri.
HON. ELMER S. DUNDY, Nebraska.
HON. CASSIUS G. FOSTER, Kansas.
HON. HENRY C. CALDWELL, Eastern District Arkansas.
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HON. MOSES HALLETT, District of Colorado.

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REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

EASTERN DISTRICT OF MISSOURI.

THE UNION TRUST COMPANY, OF NEW YORK, *v.* THE ST. LOUIS, IRON MOUNTAIN, AND SOUTHERN RAILWAY COMPANY.

1. Bill to foreclose a mortgage for default in the payment of interest on the railway and appurtenances of the defendant company. The defence was that the promoters of the suit had extended the time of payment beyond the date at which the suit was brought. The facts relating to this defence stated, and *held* not to amount to an agreement to extend, nor to estop the trustee from maintaining the bill, but only to a waiver of payment of interest at the covenant day, which may be terminated on notice and demand for full payment; TREAT, J., dissenting.
2. The mortgage in suit contained, *inter alia*, a covenant by the defendant company to pay interest on mortgages upon distinct divisions of its road made by separate companies, which were afterwards consolidated into the defendant company; the plaintiff had not paid anything in respect of these divisional mortgages, and the holders thereof were not parties to this suit: *Held*, that no decree of foreclosure could be granted in respect of the default in the payment of interest on the divisional mortgages.
3. The principal sum named in the mortgage in suit not being due, a decree can go only in respect of the interest due and unpaid.

Union Trust Company *v.* Railway Company.

(*Before* DILLON and TREAT, JJ.)

Railway Mortgage. — Foreclosure. — Extension of Time of Payment. — Estoppel. — Waiver of Payment at the Day. — Default. — Covenant to Pay Prior Mortgages. — Principal. — Interest. — Amount of Decree.

THE plaintiff is the trustee in a railway mortgage executed by the St. Louis, Iron Mountain, and Southern Railway Company (the only defendant in the cause), May 6th, 1874, upon six hundred and eighty-six miles of railway and appurtenances, to secure the payment of bonds to the nominal amount of $28,000,000. The defendant company was formed by the consolidation of the St. Louis and Iron Mountain Railroad Company, the Arkansas branch of the same, the Cairo, Arkansas, and Texas Railroad Company, and the Cairo and Fulton Railroad Company, each of which, prior to the creation of the defendant company, had constructed separate lines of railway and mortgaged the same. These companies were merged into the defendant company, which took the property subject to these several mortgages — which will be referred to hereafter as the divisional mortgages — and amounting, at the time, in the aggregate, to $21,689,000. A leading purpose of the mortgage sought to be foreclosed — known as the consolidated mortgage, and which covers all of the property embraced in the several divisional mortgages — was to convert these various mortgage debts into one mortgage debt by an exchange of the consolidated mortgage bonds for the divisional mortgage bonds. For this purpose $23,000,000 of the consolidated bonds were set apart by the consolidated mortgage to be thus exchanged. To raise additional means, to provide "for other existing debts and otherwise," $5,000,000 of the consolidated mortgage bonds were authorized to be sold by the defendant company. The scheme for the exchange of consolidated bonds for divisional bonds failed almost entirely; but a considerable portion of the additional $5,000,000 have been issued, the exact number of bonds outstanding and in the hands of *bona fide* holders not

being stated in the bill, and being a matter of contest between the bondholders. The consolidated mortgage recites these divisional mortgages, and declares the purpose of its execution to be to secure the consolidated bonds proposed to be issued; and, further, to secure the performance of the covenants in respect to a sinking fund to be commenced January 1st, 1880, in respect of which, however, no question now arises.

The *conditions of defeasance* in the consolidated mortgage are:

1. Payment of the principal and interest of the consolidated bonds.

2. Maintenance of the sinking fund as provided for.

3. Performance of the covenants on the part of the defendant railroad company in respect to the payment of taxes; and also,

4. Payment of interest by the defendant upon bonds secured by prior divisional mortgages; and,

5. Payment or discharge by the defendant of such prior divisional mortgages as might be necessary or material to the protection of the security thereby created.

In case of default in the performance of these conditions, the mortgage provides that the trustee may, upon the application of one-eighth of all the then outstanding consolidated bonds, take and hold possession of the mortgaged property, as mortgagees in possession; and in case such default should continue for three months, upon application of the holders of one-eighth of the then outstanding consolidated bonds, to proceed to sell, out of court, in the manner specified.

The defaults alleged in the bill are the failure to pay interest upon the various classes of bonds maturing as follows:

One-half interest on St. Louis and Iron Mountain second mortgage, maturing November 1st, 1876;

Entire interest on St. Louis and Iron Mountain first mortgage, maturing May 1st, 1877;

One-half interest on Cairo, Arkansas, and Texas first mortgage, maturing December 1st, 1876;

Entire interest on Cairo, Arkansas, and Texas first mortgage, maturing June 1st, 1877;

One-half interest on St. Louis and Iron Mountain (Arkansas branch) first mortgage, maturing December 1st, 1876;

Entire interest on St. Louis and Iron Mountain (Arkansas branch) first mortgage, maturing June 1st, 1877;

One-half interest on Cairo and Fulton first mortgage, maturing January 1st, 1877;

Entire interest on Cairo and Fulton first mortgage, maturing July 1st, 1877;

Entire interest on consolidated mortgage, maturing April 1st, 1877;

Entire interest on St. Louis and Iron Mountain first mortgage, maturing August 1st, 1877.

Certain payments were made after the filing of the bill, so that at the hearing of this cause, in April, 1878, the interest due and unpaid, failure to pay which is assigned as defaults, authorizing foreclosure of the consolidated mortgage, was the following—one-half of the interest upon the several classes of bonds maturing as follows:

St. Louis and Iron Mountain second mortgage, November 1st, 1877;

St. Louis and Iron Mountain second mortgage, May 1st, 1877;

St. Louis and Iron Mountain second mortgage, November 1st, 1877;

Cairo, Arkansas, and Texas first mortgage, December 1st, 1876;

Cairo, Arkansas, and Texas first mortgage, June 1st, 1877;

Cairo, Arkansas, and Texas first mortgage, December 1st, 1877;

St. Louis and Iron Mountain (Arkansas branch) first mortgage, December 1st, 1876;

St. Louis and Iron Mountain (Arkansas branch) first mortgage, June 1st, 1877;

St. Louis and Iron Mountain (Arkansas branch) first mortgage, December 1st, 1877;

Cairo and Fulton first mortgage, January 1st, 1877;
Cairo and Fulton first mortgage, July 1st, 1877;
Cairo and Fulton first mortgage, January 1st, 1878;
Consolidated mortgage, April 1st, 1877;
Consolidated mortgage, October 1st, 1877;
Consolidated mortgage, April 1st, 1878.

The bill, after alleging the defaults as stated, avers the application of the holders of upwards of one-eighth of all the outstanding consolidated bonds to the complainant trustee to proceed to enforce the consolidated mortgage by entry, and to commence and carry on appropriate proceedings, by suit in equity or otherwise, and "for the foreclosure of said mortgage," and avers the action taken by the trustee "in pursuance of such application and request."

There were four applications to the trustee, each of which requested the complainant to commence and carry on appropriate proceedings by suit in equity for the possession of the mortgaged property and foreclosure of the consolidated mortgage — the first dated April 3d, 1877; the second dated May 3d, 1877, signed by "Baring Brothers & Co., by S. G. & G. C. Ward, attorneys, holders of sixteen hundred and twenty-three of the consolidated bonds of the St. Louis, Iron Mountain, and Southern Railway Company;" the third dated May 7th, 1877; and the fourth dated August 3d, 1877, signed by "Baring Brothers & Co., by S. G. & G. C. Ward, attorneys, sixteen hundred and twenty-three bonds; Russell Sturgiss, by S. G. & G. C. Ward, attorneys, twenty-three bonds; Kirkman D. Hodgson, by S. G. & G. C. Ward, attorneys, fourteen bonds; J. Stewart Hodgson, by S. G. & G. C. Ward, attorneys, thirteen bonds; Edward C. Baring, by S. G. & G. C. Ward, attorneys, seventeen bonds; H. Bingham Mildmay, by S. G. & G. C. Ward, attorneys, seventeen bonds; C. L. Norman, by S. G. & G. C. Ward, attorneys, nine bonds; Hope & Co., by S. G. & G. C. Ward, agents, fifty bonds; Louisa, Lady Ashburton, by S. G. & G. C. Ward, agents, six bonds; Samuel Gray Ward, by George Cabot Ward, nine bonds; George Cabot Ward, fourteen bonds; D. G. Bacon, six bonds."

Samuel Gray Ward and George Cabot Ward were copartners, and were jointly and severally the attorneys in fact of Kirkman D. Hodgson, Russell Sturgiss, J. Stewart Hodgson, E. C. Baring, H. B. Mildmay, W. Moier, C. L. Norman, and T. C. Baring, individual members of the partnership firm of Baring Brothers & Co., of London, under the power of attorney in evidence; the agency of the Wards, dating from September, 1871, for the firm and for the individual members of Baring Brothers & Co., is conceded by all parties in this proceeding.

The Wards were also agents of Hope & Co., from the time Baring Brothers & Co. acquired their Iron Mountain securities. It also appears that the bonds of Lady Ashburton were held and registered in the name of S. G. & G. C. Ward, attorneys.

Thus it appears that S. G. & G. C. Ward, either personally or individually, held, or as agents or attorneys in fact represented the holders of, every bond subscribing the several applications to the trustee, with the single exception of Mr. D. G. Bacon, and of ten bonds once owned by the complainant, and since sold.

The bill prays:

1. That complainant may be put into possession of the property.

2. That the amount of principal and interest upon the outstanding bonds, issued under and secured by the consolidated mortgage, be ascertained, and payment thereof be ordered to plaintiff.

3. That said consolidated mortgage be decreed a lien on the mortgaged property, and that the company be decreed to pay all moneys now due or to become due and payable under or by virtue of said mortgage.

4. That all the mortgaged property be sold, and the net proceeds, less payments for taxes, assessments, and prior liens, be applied to payment of amounts adjudged due and owing on consolidated bonds and interest, and for general relief.

The answer sets forth the defence with much detail, but it is in substance as follows:

Coupons on the several classes of bonds having been funded, in pursuance of the terms of the circular dated February 23d, 1875, it was obligatory upon the company to pay in full its interest coupons upon all classes of bonds maturing on and after November 1st, 1876. That the company, represented by its chief executive officers — Mr. Allen, president, and Mr. Marquand, vice-president, — on and prior to October 12th, 1876, desired and intended to make such payments in full, and was ready and able to do so. That S. G. & G. C. Ward, being consolidated bondholders, and agents and attorneys of other large holders of consolidated bonds (the first coupons of which, due after such intended resumption, matured April 1st, 1877), strenuously opposed payment in full as proposed and intended by the company on November 1st, 1876, when the semi-annual coupons on the St. Louis and Iron Mountain second mortgage matured, followed chronologically by the Cairo, Arkansas, and Texas first mortgage, December 1st, 1876; St. Louis and Iron Mountain (Arkansas branch) first mortgage, December 1st, 1876; and Cairo and Fulton first mortgage, January 1st, 1877, — all of which were prior to the consolidated coupons in point of lien and time of payment — and instigated and procured the company to pay one-half only of such interest on the prior divisional mortgages, except the interest on the St. Louis and Iron Mountain first mortgage, on and after November 1st, 1876; and to apply the means of the company, which it was designed to use for payment of such interest, to other purposes, being payment of the floating debt and betterment of the mortgaged property, until such time as should be found consistent with the proper management and development of the road, which time was by them suggested as being the close of 1878; and by their words, acts, conduct, and expressions, led the defendant to believe that, in the event such course of action was taken by it, they, as holders of consolidated bonds and representatives of other holders, would withhold any exaction or demand of payment exceeding one-half of coupons of consolidated bonds held or represented by them, maturing on April 1st, 1877, and thereafter, until such

period as the income of the road should be adequate to pay them, which period was by them suggested as being November 1st, 1878. That the company, by its executive committee, authorized thereunto, accepted these propositions of the Messrs. Ward, made the agreement as stated, and in good faith has ever since, in all respects, acted upon it, and in so doing has expended its revenue and income, which would have been available and used for payment of interest, for the other purposes indicated, and thereby has irrevocably changed its position, by destroying its credit and by placing beyond recall the moneys disbursed in performance of the plan agreed upon, so that if it should be rescinded or repudiated, the company could not be restored to its former position, and would sustain ruinous and irreparable injury.

This defensive matter is set up in the answer as a valid agreement between the bondholders and the company to change the time of paying interest, as well as the amount to be paid; as waiver by the bondholders of strict performance in the payment of interest at the covenant day, and also as an estoppel on them to bring suit on the unpaid half of the coupons of the consolidated mortgage at any time prior to November 1st, 1878.

A general replication was filed, and a voluminous mass of testimony was taken, covering over one thousand five hundred printed pages. The cause is before the court on final hearing.

W. H. Peckham, *Evarts, Southmayd, & Choate*, *Henry Hitchcock*, *G. A. Madill*, and *Noble & Orrick*, for the complainant.

Glover & Shepley, *Thoroughman & Warren*, *Ashbell Green*, and *W. R. Donaldson*, for the defendant.

DILLON, *Circuit Judge.*—The consolidation of the four companies into the defendant company took place in May, 1874. The total mortgage debt of the constituent companies at that time was the sum of $21,689,000, and the floating debt was over $4,000,000. The defendant company came into existence under the weight of this heavy indebtedness. To provide for

retiring all of the bonds of the several companies and to meet the floating indebtedness, the mortgage in suit, known as the consolidated mortgage, was executed May 6th, 1874, for the nominal sum of $28,000,000, at seven per cent interest, payable semi-annually, on the first days of April and October. Twenty-three millions of the consolidated bonds were, by the terms of the mortgage, set apart to exchange for the divisional bonds; but very few were ever exchanged, and the main issue of bonds under the consolidated mortgage were out of the surplus of five millions authorized by that instrument to be used to provide for the general wants of the company.

Baring Brothers & Co., large owners of divisional bonds, in August, 1874, to aid the company in meeting its floating debt, purchased sixteen hundred and twenty-three of the consolidated bonds, amounting to $1,623,000, at seventy-one and one-half cents, currency. These bonds are still owned by this firm, of whom the Messrs. Ward, or rather Mr. Samuel G. Ward, is the American agent, with plenary powers.

As a part of the arrangement by which the sixteen hundred and twenty-three consolidated bonds were taken by the Barings, it was required that Messrs. Allen and Marquand and their friends on this side of the Atlantic should provide for an extension of the floating debt. In order to effect this, Allen and Marquand became endorsers for the company in a large amount. The company was not earning enough to extinguish the floating debt and pay all of its interest; and in February, 1875, the company, finding that the floating debt "interfered with the economy of management and depressed its securities," appealed to the bondholders to fund all of the coupons which would mature down to the last day of October, 1876.

The Barings, owners of five millions or more of the securities of the company, aided this funding scheme, on certain conditions not now material to notice, and it was acquiesced in and distinctly agreed to by the large mass of the bondholders. Mr. Allen and Mr. Marquand, respectively president and vice-president of the company, are also large owners of its securities.

The Barings were represented in the board of directors of the company by Mr. George C. Ward and by Mr. Morison. The rest of the directors seem to have been friendly to the Allen interest. In the funding scheme of February, 1875, it was promised that on November 1st, 1876, the company would resume the payment in full of interest on all classes of its bonds, divisional and consolidated. The amount of floating liabilities had, by mistake, been under-estimated in the circular of February, 1875, which set forth the funding scheme, and the expected net earnings of the company had fallen short of the estimates.

One of the leading objects of the funding scheme was to extinguish the floating debt, but, owing to the reasons just stated, this expectation had not been realized, for, although this debt had been reduced, it still amounted, on August 31st, 1876, to the sum of $1,702,778.70. The efficiency of the road, however, had been well maintained; it had a full equipment, and its earnings, under adverse circumstances of an exceptional or accidental character, had constantly increased. The system of railways in Texas with which the defendant's road connected was being gradually developed, and more than compensated the company for the loss of earnings resulting from the depression of the iron industry. The net earnings of the company were not sufficient to extinguish the floating debt, to pay interest in full, and to maintain the road and its equipment in good condition. It was nearly or quite sufficient to pay full interest if it could all be appropriated to that end. The credit of the company was good. About $250,000 of the floating debt was due employes on back pay-rolls; in September, 1876, the men had not been paid for services performed in May. Some of the floating debt bore ten per cent interest.

Such is a brief outline of the company's condition in the summer of 1876. Up to this time the Barings, represented by the Messrs. Ward, and the management, represented by Mr. Allen, had worked together in harmony. Unfortunately for the great interests here concerned, causes of difference gradually arose, which, in March, 1877, resulted in mutual distrust and aliena-

tion. It is not material to any legal question now presented to determine on which side the blame lay.

The duty of the court is to ascertain the legal effect on the rights of the holders of the consolidated bonds of what took place in October, 1876, between the Messrs. Ward, as the representatives of the Barings and certain other bondholders, on the one side, and the defendant company, through its officers, on the other. At this time a radical conflict of views as to the policy to be adopted by the company displayed itself. The parties were still working in concert, and we find no satisfactory proof in this record that at this time each was not acting from a sense of duty and in entire good faith. In the situation of the company's affairs, there was ample room for difference of judgment respecting the course to be pursued. Which would prove to be the wiser, no sagacity could forecast with certainty, for it would depend upon the amount of future earnings, and upon the disposition and views of a large number of creditors, scattered over the world.

It appears, with clearness, that the purpose of the company's officers was to commence to pay interest in full November 1st, 1876, on the expiration of the funding plan. Mr. Allen and several of the directors strongly favored this policy, and Mr. Marquand urged it with emphasis. The Messrs. Ward were of a different opinion. They insisted that, as the earnings were not sufficient to pay the floating debt and to pay and *continue* the payment of interest in full, the true policy was to pay only one-half interest on the great body of the secured indebtedness, and to appropriate the rest of the net earnings to the extinguishment of the floating debt, and to maintaining the efficient condition of the property.

Several hundreds of closely-printed pages of oral evidence touching this difference of opinion, and the views and arguments of the several actors in the transaction, and as to what was intended, have been taken, in portions of which there is considerable conflict. It is not my purpose to refer to this at length, for what was concluded appears in the official records of the

company's action, in the circular of President Allen of the 20th day of October, and in the letter of Mr. Samuel G. Ward of October 21st, accompanied by an abstract of Mr. Morison's report on the condition and prospects of the road, of date October 16th, made at the instance of Mr. Ward, and addressed to him, and in the accompanying correspondence. The oral testimony does not vary the legal effect of the record, documentary and written evidence; and it is altogether more satisfactory to make this the basis of judgment than the parol evidence of statements and intentions. To become thoroughly informed concerning the road, its condition, wants, earnings, and prospects, Mr. Samuel G. Ward, for himself, but mainly for the foreign bondholders whose interests he represented, of whom the Barings were the largest, in September, 1876, procured Mr. Morison, a civil engineer of large experience and a director in the company, to make an examination of the road and report the result. Mr. Morison, who had the confidence of Mr. Ward, made such examination and a report dated October 12th, 1876. This report gives a detailed view of the company's situation; and, after referring to the condition of the floating debt and the probable earnings of the road, says: "Under these circumstances, an attempt to pay these maturing obligations in full would lead to a rapid increase, instead of diminution, in the floating debt, and must early result in disaster. While, however, it would appear very unwise to attempt to pay this interest in full, the revenues of the road are sufficient for the payment of a portion of it. The wisest course, in my judgment, would be to continue to pay in full the interest upon the St. Louis and Iron Mountain Railroad first mortgage bonds, and upon the funded interest certificates; to pay one-half of the interest coupons of the several other unconsolidated bonds, while action as regards the consolidated mortgage bonds may safely be suspended to abide the developments of this winter's traffic." (The earliest interest on the consolidated bonds would not fall due until April 1st, 1877.)

His report concluded with this recommendation: "Under the circumstances, it would appear to me most desirable to pay one-

half of each coupon of the divisional bonds in gold as they mature, and to issue scrip for the remaining half, such scrip to be redeemed with compound interest at seven per cent before the payment of any dividend upon the stock. The coupons should have the amount paid stamped upon them, and be placed with a trust company as security for the scrip. I see no advantage to be gained by asking the formal approval of the bondholders to this plan, as the implied approval which the acceptance of such half payment would give would be all that is necessary. A circular should be prepared stating the circumstances and expectations of the company, and showing plainly the inability to make payment in full; it should also state that it is the belief of the directors that they will be unable to pay more than one-half of each of the four next maturing coupons, but that after that time they confidently hope to be able to resume payment in full, but it should contain no absolute pledge to that effect, as there are many contingencies attending the development of trade with a newly-settled country, which may vitiate the most careful calculations and overturn the best grounded hopes."

These recommendations had the approval of the Messrs. Ward, and the report was read at the meeting of the board of directors held in the city of New York on the 12th day of October.

The Allen party still insisted on the payment of interest in full as the true policy. It seemed to be admitted on all hands that the company could pay interest in full for a few months, but the Wards insisted that it could not *continue* to do this and do what else ought to be done, while Allen and Marquand and their friends in the directory urged that what the earnings might fall short could be supplemented by the credit of the company, or by a sale of its remaining consolidated bonds, or in some other way. The Messrs. Ward were firm, and after several meetings of the board and the executive committee, at which the subject was discussed, Mr. Allen finally yielded, and with him the executive committee. Mr. Allen, as president, prepared the circular of October 20th, above referred to, addressed to the bondholders, and read the same to the executive committee, "who

unanimously voted to issue it and to send copies to the bondholders."

On motion of Mr. George C. Ward (a member of the executive committee), "the treasurer was authorized to prepare the proper stamps and to mark upon the coupons, as they shall be presented, the one-half payment."

The draft of this circular had been prepared by Mr. Allen on the day before (October 19th), and was on that day submitted to Mr. Samuel G. Ward. The draft thus submitted contained a clause providing that the bondholders, on presenting their coupons, would be paid one-half in cash and be given for the unpaid half, at their option, interest-bearing certificates or consolidated mortgage bonds, or the coupons stamped as half paid. Mr. Ward objected to this provision, and it was stricken out from the draft. The draft also stated that the company would follow this course for two years, beginning with November 1st, 1876. This clause also was stricken out on Mr. Ward's objecting to it, so that the draft, as finally amended, simply stated that the company would pay one-half of each coupon as presented, and fixed no time at which the company would pay its coupons in full.

The circular of the president, as thus amended, and as authorized to be issued by the executive committee, is dated October 20th, 1876, addressed "to the bondholders," and, after stating in detail the financial condition and prospects of the company, concludes as follows:

"The floating debt of the company on the 1st of January next will amount to about $1,595,000. It is a variable quantity, more or less of which must always remain with a railroad in operation. About $750,000 of it should be paid in 1877. The interest which will accrue in 1877 upon all kinds of indebtedness, including gold premium, will be about $2,150,000. New constructions, steel rails, and other necessary improvements for the maintenance of the property in good order and efficiency, may require near twelve per cent of the earnings. The operating and general expenses and taxes will consume about fifty per

cent. Without a large increase of earnings, therefore, it becomes apparent that the time for the resumption of the payment of the interest in full, with a fair expectation of maintaining it, has not yet arrived. The company will, therefore, pay, on and after November 1st, 1876, all the interest, as heretofore, on the first mortgage (St. Louis and Iron Mountain Railroad bonds), and all interest upon all classes of the funded certificates, and half the interest coupons on other classes of bonds as they mature and are presented for payment. The object of this arrangement is to enable the company the more completely to effect the purpose of the circular of February 23d, 1875, by the continued reduction of debts, and thereby to save a large amount in interest now paid on supply bills, and to effect an important saving in the cost of labor by prompt payment, and to make the renewals, betterments, and constructions which experience may prove to be necessary for the economical and profitable operation of the road."

This circular, it will be perceived, required no consent of the bondholders, or action on their part; nor did it state how long the plan of half payment would continue.

The Messrs. Ward and the officers of the company were still acting in concert; and it was understood that Mr. Samuel G. Ward, as the main representative of the largest bondholders, would give the plan adopted (which was in reality his own) his public approval, and thus aid in securing the approval of the bondholders at large.

With this view Mr. Ward caused Mr. Morison to make a careful abstract of his report, with some modifications, which was to be sent to the bondholders with a circular-letter of Mr. Ward approving the plan embodied in the above-mentioned circular of President Allen. The portion of the original report of Mr. Morison, above quoted in the abstract prepared to be sent to the bondholders, was changed so as to read as follows:

"This amount of interest will manifestly be materially in excess of any earnings which we can hope for. If the interest on

the St. Louis and Iron Mountain Railroad first mortgage bonds and the funded interest certificates were to be paid in full (as had already been done), and one-half of the interest be paid upon the other classes of bonds, the floating debt would be gradually extinguished, and within a reasonable length of time the company might hope to see itself relieved from its embarrassments. Under this course the amount of interest to be paid from this date to and including January 1st, 1877, would be about $530,000; this amount covers the gold premium and the floating debt interest. Should the estimated earnings be realized, there would remain $420,000, which would suffice to bring up the pay-roll arrears and leave a surplus to be applied to other items of the extended and current debts. The interest to be paid for 1877, including gold premium and floating debt interest, would be about $1,350,000, which would leave a balance of $400,000 from the estimated net revenue, a portion of which would probably be needed for special betterments to meet the growth of traffic, and the remainder could be applied to the floating debt. Before the close of 1878, if the hoped-for growth of business is realized, the full payment of interest could probably be resumed."

It will be seen that this differs materially from the recommendations of the original report to Mr. Ward. That recommended half interest on the divisional bonds for the four next maturing coupons, reserving action for the present as respects the consolidated bonds. The original report provided for the issue of scrip for the unpaid half of the four coupons, with a pledge of the coupons in trust as security for the scrip. This provision is omitted from the abstract of the report. The original report expressly named four coupons; this the abstract omits, and in lieu of it contains the vague statement that "before the close of 1878 * * * full payment of interest can probably be resumed."

Mr. Ward prefaced this abstract of Mr. Morison's report with this letter:

"NEW YORK, October 21st, 1876.

"The continued depression of the business of the country has caused such a disappointment as to the receipts which it seemed reasonable to anticipate for the St. Louis, Iron Mountain, and Southern Railway Company, at the time when the funding arrangement was adopted, as to make it apparent to the directors that it would be premature at this time to resume payment of interest in full.

"The plan which has been proposed by them of paying one-half the interest in cash, continuing payment in full on the first mortgage bonds and the funding certificates, and at the same time continuing the reduction of the floating debt, and developing the business of the road, in connection with the newly-finished lines leading to it, has had my careful consideration and approval, as the representative of several of the largest bondholders. Since the circular of February, 1875, I have caused thorough examination of the accounts of the road to be made by Mr. William E. Warren; and Mr. George S. Morison has, at my request, made a careful and repeated personal examination of the condition and business of the road; the results of which, up to the latest dates, will be found in his accompanying report to me. With these facts before me, and taking into account the large and growing receipts of the road, at a period of the greatest depression, it has seemed to me that the directors have found the wisest solution of the problem that presents itself, in paying such portion of the interest as can be met consistently with the continued reduction of the floating debt, while keeping up the efficient condition of the property.

"SAMUEL G. WARD."

This letter and the abstract of Mr. Morison's report were printed and sent by Mr. Ward to his principals and to his personal friends among the bondholders; and President Allen's circular of October 20th was likewise printed and sent by the company's officers to all of the holders of divisional and consolidated bonds.

On November 1st, the semi-annual coupons of thirty-five dollars each of the divisional second mortgage bonds of the St. Louis and Iron Mountain Railroad Company fell due. They were presented by the holders, who were paid one-half thereof, and the following words being stamped on the coupons: "Paid $17.50 on this coupon, November, 1876," they were returned to the respective holders. The Messrs. Ward presented coupons owned by themselves and others, and received half payment in this manner without objection. Coupons matured December 1st on the divisional mortgage of the Cairo, Arkansas, and Texas Railroad Company, and also on the Arkansas branch, which were presented and one-half paid, and the coupons stamped as above and returned to the holders. On January 1st, 1877, coupons for interest on the bonds of the Cairo and Fulton divisional mortgage fell due, and on being presented one-half was paid and stamped thereon and returned to the holders. In March, 1877, if not before, a misunderstanding arose between Mr. Samuel G. Ward and Mr. Allen, and when the coupons of the consolidated bonds fell due, April 1st, 1877, Mr. Ward demanded payment in full; the company offered to pay one-half, which was refused, and a bill of foreclosure filed in this court by the trustee, April 6th, 1877, asking for a receiver, which was refused. (4 Dillon, 114.)

This bill was afterwards voluntarily dismissed by the trustee, and soon afterwards, viz., August 9th, 1877, the present bill was filed, based on the defaults above mentioned, in paying only one-half of the amount of the coupons on the divisional mortgages and one-half of the coupons due April 1st on the consolidated mortgage, one-half having subsequently been paid and received by the Messrs. Ward under protest, reserving all rights. Meanwhile, since October, 1876, the company has been acting upon the theory that it was only bound to pay one-half, and has been appropriating the residue of the net income to the reduction of the floating debt, giving preference, as the Messrs. Ward complain, to the extinguishment of debts on which Mr. Allen and Mr. Marquand were indorsers, rather than to the payment of arrearages on the pay-rolls.

Upon these facts three questions of law arise:

1. Was there a valid agreement, founded upon a sufficient consideration, whereby the payment of one-half interest on the bonds, both divisional and consolidated, so far as owned or controlled by the Messrs. Ward, was extended to November 1st, 1878?

2. Whether what was thus said and done by the Messrs. Ward in October, 1876, created as to them and their principals an equitable estoppel to instigate and maintain a foreclosure bill prior to November 1st, 1878?

3. If there was no such valid agreement or estoppel, what is the legal effect on the rights of the bondholders of the transactions of October, 1876?

Briefly of these questions in their order: It is to be recollected that the divisional bonds (excluding the Iron Mountain firsts, which were to be paid in full), amounted to about $20,000,000, in some of which the Barings and Wards had but little interest, and in none of which, perhaps, a controlling interest. They did own and control a majority of the consolidated bonds then outstanding. What was finally concluded put the divisional bonds and the consolidated bonds on the same footing.

The Messrs. Ward refused to make any separate arrangement as respects bonds owned and controlled by them different from the other bondholders. There is nothing in the circular of President Allen of October 20th, and nothing in what was done under it, from which it can be claimed that bondholders not represented by the Messrs. Ward had made an agreement to extend the time for the payment of interest. They still hold their coupons; they have accepted nothing in the place of them; they have simply received one-half of the amount due thereon.

When we consider that the circular of the president (the only act of the company from which any agreement on its part is to be deduced) asks for no extension for any specified time, and for no agreement of any kind from the bondholder, but simply says, "The company will, therefore, pay, on and after November 1st,

1876, * * half the interest coupons on other classes of bonds as they mature and are presented for payment," it is difficult to see any solid foundation for the claim that there was a contract for a definite extension. This is made more evident from the fact that the words in the original draft of the circular looking to a specific agreement for two years from November 1st, 1876, were stricken out at the instance of Mr. Ward before the circular was adopted by the executive committee.

The question as to the estoppel upon the Messrs. Ward and those whom they represent, is one of much more difficulty. It is clear that the company adopted the plan of half payment of interest against the judgment of its officers, and upon the urgent requirement of Mr. Ward; and that it had appropriated, between that time and April 1st, its earnings to the reduction of the unsecured debts and purposes other than it would have done if it had expected to resume full payment of interest as early as April, 1877.

It is, perhaps, clear enough that it was hoped that the bondholders, at least those represented by the Messrs. Ward, would be content to receive half interest, if the company should continue to desire the indulgence, for the period of two years; but the difficulty is that the Messrs. Ward made no distinct or specific promise to that effect. The company was free to pay in full at any time it might find itself able to do so.

It is also equally clear that if Mr. Allen and the executive committee had anticipated the trouble that afterwards arose, and that full payment would be demanded on and after April next, they would never have consented to the plan urged by Mr. Ward. Grant all this, and that Mr. Ward's subsequent course disappoints expectations which his previous course might justly raise, still this falls short of establishing that he has estopped himself and his principals to enforce the payment of interest on their bonds for two years, when it is evident that such an estoppel would not exist against any other bondholders. All of the bonds were put upon the same footing, and if there is an estoppel upon the Wards and the Barings as respects the consolidated

bonds, it equally applies to the divisional bonds owned by them; the result of which would be that a portion of the bondholders would be disabled during two years from enforcing the payment of interest, and the rest not. This was never intended. It is also true that the changed course of the Messrs. Ward in April, 1877, and subsequently, in demanding full payment of the interest on the consolidated bonds, would, if it had been complied with, have worked injustice to the holders of divisional bonds who had, through the influence of the Messrs. Ward, accepted, in November, December, and January, half payment of their coupons, although these had a prior lien to the consolidated bonds. To pay on the latter interest in full, and only half on the others having a superior lien, would be manifestly inequitable to the holders of the divisional bonds.

The estoppel for the period of two years from November 1st, 1876, fails, because the time during which the payment of half interest should be made was left indefinite. Although this point was not adjudged in the application for the receiver, yet such seems to have been the impression that the transaction, which was then fully brought to view, made upon Mr. Justice MILLER, who says that the plan of the Messrs. Ward contemplated "that half of each coupon represented should be paid, relying upon the leniency of the holders for such extension of time as should be necessary or useful." (4 Dillon, 120.)

In my view, the true legal effect of what was done by the Messrs. Ward in October, 1876, was, as respects bonds owned or controlled by them, to consent to the company's paying only half interest for an indefinite time, supposed not to exceed two years. They were not bound to wait two years, because they did not so agree or promise; but within that time they could not suddenly terminate the plan which had been entered on, without reasonable or fair notice to the company; and, therefore, it is doubtful whether the first bill filed could have been maintained. Fears that it could not, led, perhaps, to its voluntary dismissal.

But on April 3d, 1877, and constantly thereafter, the com-

pany and other bondholders had notice that, so far as the Messrs. Ward and those whom they represented were concerned, the half payment plan was at an end; that full payment of interest would thereafter be, as in fact it was, demanded, and the present suit was not commenced until August, 1877.

The principle on which *Albert* v. *Grosvenor Investment Company* (Law Rep. 3 Q. B. 1–23), was decided is applicable here. In that case, on the 28th of August, the day on which, by the terms of the mortgage, an installment was due, the wife of the mortgagor asked the mortgagee to wait until the 11th of September, to which he assented. The mortgage provided that on "default" of payment at the time covenanted, the mortgagee might take possession and sell. On the 7th of September the mortgagee took forcible possession and sold the property. In an action by the mortgagor against the mortgagee to recover damages, it was held that there was no "default," and that a default could not be predicated of an omission to pay at the covenant day when that "omission was with the concurrence of the other party." In this view Lord Chief Justice COCKBURN, and LUSH, J., concurred, the latter observing: "Default must mean something wrongful, some omission to do that which ought to have been done by one of the parties, and this cannot be when the omission to make payment has the concurrence of the other party. It is true that the defendants (mortgagees) were not bound by this license or giving of time, as there was no consideration, and they might have revoked it at any time and demanded payment of the installment, and if it had not been paid there would have been a default."

The only failure in the payment of interest on the consolidated mortgage which had occurred when the present bill was filed was in respect of the April, 1877, coupons. The defaults in the payment of interest on the divisional bonds, from the very nature of the case, are not available in this suit (which is solely on the consolidated mortgage) as the basis of a decree of foreclosure. The complainant has not paid the divisional bondholders, so as to become subrogated to their rights. And if it had,

such rights pertain and are limited to separate divisions of the road, and must be asserted against the specific property mortgaged. We cannot decree to the complainant in this suit any sum in respect of the defaults on the divisional mortgages, since it has no right to receive the money due on those mortgages; and the court on this bill has no authority to order the sale of specific property covered by the several divisional mortgages.

The complainant, as the trustee representing all the bondholders, is only entitled to a decree as respects the non-payment of interest on the consolidated mortgage. There is no provision in the instrument that a default in the payment of interest will cause the principal sum to fall due; and hence, there can in no event be a foreclosure except for the interest due and unpaid on the consolidated mortgage. Judge TREAT is of the opinion that the transactions of October, 1876, work an equitable estoppel on the promoters of this suit to maintain it, and, if desired, we will finally certify a division of opinion on this point to the supreme court. Meanwhile, the cause will stand for further hearing as to the contested bonds, or be referred to a master to state an account and report.

TREAT, J., *dissenting.*—A large mass of evidence has been presented, and many points suggested, which, in the view I take of the case, are of little moment, so far as the principal controversy is concerned, viz., the right of the complainant to the foreclosure sought under the facts and circumstances developed.

As to the advisability of the plan adopted in October, 1876, with respect to payment of half interest, or the comparative merits of the various schemes suggested at that time, this court has nothing to do, further than they tend to show the nature and extent of the conclusion reached and its operative effect in law or equity. It may be that Allen and Marquand were too sanguine and the Wards too timid, but no comments upon that point are required. Parties interested in a common enterprise of great magnitude may fairly and justly differ as to the best plan for present and future operations, especially when their con-

clusions must be based, to a large extent, upon prospective earnings, etc. Such differences are natural, and are in no way censurable; for one important purpose in having a board of direction, instead of a single manager, is to secure the benefits resulting from the respective views of many minds. The then condition of the defendant, and its estimated income, justified an honest difference of opinion.

The following brief statement of facts, as established by the evidence, suggests the rules of law and equity by which the case should be controlled.

The defendant corporation came into existence by the consolidation of several distinct corporations, each of which owned some part of the main line, or some of the branches. Each of said distinct corporations owed bonded and other debts. To provide for those debts, this defendant formed the plan, sufficiently explained in the mortgage now made the basis of this suit, reciting the indebtedness of each of the prior corporations, and setting apart twenty-three of the twenty-eight millions of consolidated bonds for the redemption or exchange of divisional bonds. It seems to have been then supposed that the holders of the latter bonds could be induced to make the desired exchange. In that the defendant was disappointed, for only a few bonds were so exchanged. The five millions in consolidated bonds, not reserved out of the twenty-eight as just stated, would be needed to complete the work contemplated and pay the floating debt.

In that condition of affairs, the defendant, early in 1875, became unable to prosecute its work, pay the floating debt, and meet the interest on the consolidated and divisional bonds. To provide for the difficulty, it was agreed to fund coupons falling due prior to November, 1876, issuing therefor fund certificates running for several years and bearing semi-annual interest.

As early as September, 1876, the parties commenced suggesting plans with respect to the payment of interest falling due after October of that year. The prior funding plan embraced no coupons falling due after October, and evidently contem-

plated that subsequent thereto interest as it matured would be promptly paid in full.

The Wards represented large interests, and had caused Mr. Warren, and subsequently Mr. Morison, to make full and careful examinations into the condition and prospects of the road. Before Mr. Morison had finished his work, Mr. George C. Ward had suggested the propriety of funding one more of each of the series of coupons. He was a director of the defendant, and also a member of the copartnership of S. G. & G. C. Ward. His suggestion received no support. Allen, the president of the defendant, H. G. Marquand, vice-president, and the majority of the directors, insisted upon full payment of all interest as it thereafter matured. To meet objections raised principally by the Wards, who were of opinion that payment in full could not be maintained, Allen and Marquand made many suggestions. The Wards, for themselves and the Barings, deemed it very important that the large floating debt should be reduced, and the needed betterments secured, which objects they supposed could not be effected if interest were paid in full. They preferred the plan of paying only half interest. On the return of Mr. Morison to New York, where the board was to meet, he made a full and careful report to Mr. S. G. Ward, who had the more immediate charge of the Barings' interests. In that report half payments were suggested for at least two years, with a certificate for the other half, bearing compound interest. The result of all the discussions was that Allen, Marquand, and the other members of the board (a majority against its expressed views), consented to the plan finally urged by S. G. Ward, which was the payment of half interest for an indefinite period of time, with the expectation that full resumption could be had late in 1878, but the defendant to be left free to resume in full at an earlier day if practicable.

It is unnecessary to enter upon a critical examination of the various plans suggested and of the modifications proposed from time to time. When a draft of the plan to be issued in the form of a circular to the bondholders was submitted by Mr.

Allen to Mr. S. G. Ward, the latter caused to be erased all other provisions than what announced the proposed payment of only one-half interest, except on the Iron Mountain firsts and the funded certificates. What thus occurred is very significant. It is evident that Mr. Allen was anxious to the last to use some of the consolidated bonds, unissued, to meet the then condition of affairs; for he and Marquand had zealously urged that full payments would appreciate the securities, whereby the unissued bonds could be utilized.

Mr. Morison states what occurred at that interview, as to the draft of the circular, viz.: "Mr. Allen read the draft of a circular to be sent to the bondholders, and various changes were made in this draft as he read it; there were some small changes in some of the figures and estimates, though none that were material. The draft of the circular contained a clause providing that the bondholders, on presenting their coupons, would be paid one-half in cash and be given for the unpaid half, at their option, interest-bearing certificates or consolidated mortgage bonds, or the coupons stamped as half paid; Mr. Ward objected to this provision, and it was stricken out from the draft. The draft also stated that the company would follow this course for two years, beginning with November 1st, 1876. This clause was also stricken out on Mr. Ward objecting to it; so that the draft, as finally amended, simply stated that the company would pay one-half of each coupon as presented, and fixed no time at which the company would pay its coupons in full."

The conferences, correspondence, and expressed views of the several parties, before the defendant's circular was issued, October 20th, 1876, as well as the apprehensions expressed by Allen and Marquand concerning the plan after its adoption, and S. G. Ward's replies thereto, render the foregoing statement by Mr. Morison not only credible, but entirely consistent with the views and conduct of the negotiating parties.

It must be borne in mind that several of the sets of coupons under consideration were attached to securities prior in right to the consolidated mortgage, although they pertained to separate

divisions of the road only. Hence, it might have well been doubted whether the holders of those coupons, who had refused to exchange them and the bonds to which they were attached for consolidated bonds and coupons, would be content to have them put on a par with the consolidated coupons. Why should they receive half payments only, and the subsequent or consolidated security receive the same? Why not stand on their strict rights?

In that connection, it was promised by S. G. Ward that he would issue, simultaneously with the defendant's circular, a circular signed by himself endorsing the plan, and that his recommendation as the representative of large interests, he declared, would probably induce general assent to the plan adopted. His circular was to be accompanied by an abstract of Morison's report; and was issued accordingly, and so accompanied.

Pursuant to that plan, the defendant paid one-half of each coupon up to April, 1877, stamping on each, as presented, half paid, and leaving the coupon so stamped in the hands of the holder. Instead of paying the other half, it applied the surplus funds to the reduction of the floating debt, etc.

Semi-annual coupons on the consolidated mortgage which fell due April 1st, 1877, so far as controlled by the Wards, were presented to defendant and *full* payment then demanded. The defendant offered to pay one-half, which offer was refused. Promptly thereafter, a bill to foreclose the consolidated mortgage was filed in this court, an application for receiver made and refused, and the suit left pending until August, 1877, when it was dismissed and the present bill filed. In the meantime, the defendant failed to pay any sum on the divisional coupons maturing, but since this suit was brought, and before the hearing, paid one-half, which was received under protest, etc.

These are the salient facts; and to my mind they establish not a contract between the defendant and *the body* of the bondholders to postpone half payment for two years, or for any specified time, but they do show an agreement or assent on the part of the defendant and *the Wards*, in behalf of those whom

they represented, that they, at least, would not interfere with defendant in consequence of its failure or refusal to pay more than one-half on maturing coupons, leaving the defendant to pay the other half as soon as it could justifiably do so, even within six months or a year, if it desired.

Hence the statute of frauds has no application to the case. The distinction is a clear one as to an agreement between defendant and the Wards, concerning their respective rights and obligations, *inter sese*, and an agreement between defendant and *all* the bondholders. The Wards did not represent all bondholders, and could bind only those whom they did represent.

When they induced and endorsed the plan, they purposely caused it, unlike the funding agreement of 1875, not to depend, so far as they were concerned, on the assent of eighty per cent or of any specified number of bondholders. The vice of the argument, it seems to me, springs from a failure to observe the broad distinction mentioned.

Other bondholders did not enter into a specific agreement, oral or otherwise, to postpone full payment of their coupons, and hence, as to them, the doctrine of license or dispensation may have some force. When they become promoters of a suit, that question will arise and may have to be determined, for this suit is not based "on the option" of plaintiff as trustee, but on the request of the prescribed one-eighth of the bondholders.

But if the statute of frauds could be invoked, it would not apply, because:

1. The deferred payment was not necessarily for two years, but as the Wards compelled it to be made, viz., for an indefinite time, with leave to defendant to resume in full within one year. (*McPherson* v. *Cox*, *Walker* v. *Johnson*, 96 U. S. Sup. Ct. Rep.)

2. There was assent in writing by S. G. Ward to the written circular of the defendant, as evidenced by his circular and many letters. There was a printed proposal by defendant, and a printed and published endorsement and assent by S. G. Ward, which would affect the interests represented by him.

If the statute of frauds, however, were applicable, the defence is complete on the ground of equitable estoppel; and all the elements of which appear from the foregoing statement of facts.

This suit is based on the consolidated mortgage, and at the time it was brought only one set of coupons, that of April, 1877, had matured. If a foreclosure were to be decreed it could be only for the amount of the default in such payment. What may have been the rights of the plaintiff (the Trust Company), if any, as to taking possession, etc., on breach of covenant to keep down prior incumbrances, such a breach cannot be ground for an independent suit for foreclosure under the consolidated mortgage; for the foreclosure would still leave outstanding all prior mortgages, which are respectively on separate divisions of the road, and not on the whole road. Under those prior mortgages, there would have to be distinct suits as to each division, no one division being bound for a mortgage on another. The plaintiff in this suit is in no sense the assignee of the other mortgagees, nor has he been in any manner subrogated to their rights. And even if he were, he could not consolidate such rights, and bring one suit on all of the divisional mortgages against the whole road, instead of separate suits against each division. The plaintiff did not pay the coupons on the divisional mortgages, nor, as trustee under the consolidated mortgage, had he power to do so. A failure to pay coupons on the divisional mortgages did not vest the trustee under the consolidated mortgage with a right to foreclose under the divisional mortgages. If no such right exists, then the basis of this suit was *solely* the non-payment in full of the April coupons on the consolidated mortgage and non-compliance with mortgage covenants. Payment of one-half of the coupons under the consolidated mortgage was tendered and refused.

The plaintiff is in no better position under the present than under the former bill. The court should therefore eliminate from the case all other grounds of default; for parties in interest under the divisional mortgages are not here complaining.

Looking, then, solely to that alleged default, and to what occurred in October, 1876, between the Wards and the defendant, and to the other evident fact that, omitting the Wards, the required one-eighth have not promoted this suit, it must be decided whether the relief asked can be granted according to equitable rules. This is not a controversy between the Barings (or Wards) and Allen and Marquand; but a suit between the trustee and the defendant corporation. There are larger interests at stake than are represented by those persons as private individuals. The directors of the defendant are trustees of the stockholders, all of whose rights are sought to be destroyed. If the right to foreclose exists, it must be enforced, even if so disastrous a result follows. But a court of equity should, when such a catastrophe is probable, and perhaps unnecessary, investigate most rigidly the grounds on which the alleged right is based, so that the enforcement of a pretended equitable right may not be productive of gross inequity.

Whatever view may be taken concerning the October plan and the course pursued thereunder, without objection and with the full assent, at least, of the Wards, their conduct in April involved, among other inequitable results, extreme injustice towards the holders of divisional coupons. The latter had a prior right to payment in full, but had been induced to forego that right for a time. Until full payment to them, in strict law there should have been no payment on the consolidated coupons. But when they had been induced—say, at the instance of the Wards—to postpone the assertion of their full rights, and the time had come, in April, 1877, when the consolidated coupons could be presented for payment for the first time, is it not clear that if the demand of the Wards had been acceded to, and full payment made, an unjust and inequitable advantage would have been granted? Suppose the arrangement had never been made, and yet only half payment had on the divisional coupons—and then suppose the holders of those coupons were lulled to sleep by a vague understanding or a positive statement that no more could be paid, consistently with the interests of all concerned—

and then suppose the holders of the consolidated coupons in April demanded full payment of their coupons — what would, in strict justice, have been the duty of the defendant, if it had not ample funds to meet all of its bonded requirements? Should it not have replied that, before you are paid anything, we must pay in full the other and prior sets of coupons? If, on the other hand, it had acceded to the request of the Wards, would it not have enabled them to secure full payment at the expense of others, prior in right? If the defendant is unable to stagger, as is urged, under its bonded indebtedness and accruing interest, where were the fairness and honesty of absorbing its assets in the payment of interest on the last in right, and leaving the other, prior in right, unsatisfied? Certainly, it could not have been a part of the October plan to have such injustice wrought? If so, it fraudulently concealed such plan from the unsuspecting holders of divisional bonds, and the party thereto would be estopped, even under the narrowest rules on the subject.

The case, however, is one where the defendant was induced, by the persistent course of the promovents, to adopt a plan of action, in the pursuit of which it became unable to meet the changed course they required. They now seek to escape from their promises, and take advantage of what they caused to be done, to the probable ruin of the defendant corporation, and, possibly, the divisional interests.

There are many minor questions presented in the arguments which it is unnecessary to comment upon.

What was reasonable notice that the October agreement was at an end? Was it to demand full payment on the consolidated mortgage when the April coupons fell due in 1877, on the very day when they fell due, although bondholders prior in right had by the promovents been induced to accept half payments? If no such practical fraud was permissible, how do these promovents better their standing by dismissing their original bill, and, when further payments on the *divisional* mortgages had not been made, and no further payment on the consolidated was due, by proceeding *de novo*, on the ground that only half payments were made under the divisional mortgages, etc.?

Is the basis of the new right the demand in April for full payments of the sums due under the consolidated mortgage? That demand was not then enforceable. Since then, and prior to the filing of this bill, no interest had fallen due under *that* mortgage. But interest had fallen due under the divisional mortgages, and the covenants in the consolidated mortgage required that interest to be kept down. The failure to keep down that interest would, of course, have been a breach of the mortgage covenants, unless waived. Was it not waived under the facts in evidence?

It is not my purpose to go further into details. It seems to me that, under the recognized doctrine of equitable estoppel, this action cannot be maintained. If different views obtain, the practical workings of this suit under a decree, looking to all the legal and equitable rights involved, will only wreck the defendant, to the destruction of interests resting on the consolidated mortgage, and possibly the divisional mortgages. Well might this plaintiff, as trustee under the consolidated mortgage, shrink from instituting this suit, on its own motion, and base its conduct on the request of the enumerated one-eighth in interest. True, courts do not fail to enforce the clear rights of parties because the course sought might not be the most prudent for them; but when the larger interests of many persons are involved in the fate of a common enterprise, they should carefully ascertain what are the rights of the contestants, and not decree forfeitures against the equities of the case, to the unnecessary destruction of interests not represented.

The value of the defendant's enterprise evidently rests, to a large extent, upon the consolidation of the various parts or divisions.

That I may be clearly understood, let it be borne in mind that, despite the arrangement in 1876, the bill filed in April, 1877, proceeded on the ground that only half interest had been paid on the divisional coupons, and only half tendered on the April coupons under the consolidated mortgage. The parties to the divisional mortgages had made no complaint, and were not before the court complaining of what had not been done at the

instance of their promovents. Hence, the doctrine of waiver applies to them. As stated in the opinion of my brother judge, it was doubtful if these promovents could have maintained the bill filed in April (and I doubt not that it could *not have* been maintained)—how, then, is their position improved under this bill? The promovents had, in April, 1877, instituted proceedings for foreclosure on the ground of only half payments on divisional coupons, and, substantially, on consolidated coupons due in April; consequently, the defendant was, by such suit, put in the embarrassing condition to pay thereafter, in violation of the understanding, no coupon falling due until the litigation was ended, or of paying half interest according to the understanding, or of paying full interest. It stood still, waiting the action and orders of the court.

After this new suit, it did pay the half interest without waiting for the orders of the court; thus preserving its original status or rights under the agreement of 1876. If the relationship of the parties under the divisional mortgages and the consolidated mortgage are observed (the former waiving or not complaining), then the action of these promovents under the latter mortgage, seeking mainly, from non-payment of *divisional* coupons, to enforce their *subsequent* mortgage, we will have a clearer view of the supposed equities on which this bill is based. True, it was important to the bondholders under the consolidated mortgage that the interest on the divisional mortgages should be paid at maturity; and it is equally true that to give value to the former, under this uncompleted enterprise, the payment in full under the latter should be delayed. Where that delay was caused by the former (so far as these promovents are concerned), for their special benefit, why should they be heard to assert in a court of equity that what was done at their special instance and request, for their alleged benefit, gave them a right to take advantage of their own wrong, to the destruction, it may be, not of the interests of the stockholders alone, but also of the holders of other bonds. I refrain from amplifying further.

My opinion is that the bill should be dismissed.

NOTE.—The following decree was entered, in accordance with the opinion of the circuit judge:

"It is found that the equities in this case are with the complainant, and that the defendant is in default of the interest coupons upon the bonds secured by the consolidated mortgage described in the bill, which coupons matured and fell due on the 1st of April, 1877, and that the complainant is entitled to recover the amount thereof.

"And it is further adjudged and decreed that it be referred to a master, to inquire, compute, and report to the court what amount is due and unpaid on such of said coupons as matured on the 1st day of April, A. D. 1877.

"And it is further ordered that said master do compute and report to the court what amount is due and unpaid on such of said coupons as shall have matured after the 1st day of April, 1877, and which remain unpaid to the date of the filing of the report of said master; and that the said master, in computing the amounts of such coupons as aforesaid, do separately compute the amounts of all such of said coupons, if any, whereof the ownership or the title thereto may be contested before him; also that the said master ascertain and report what persons were, at the date of filing said bill, and also what persons now are, the *bona fide* holders and owners of all outstanding bonds claimed to be secured by said consolidated mortgage, and that the complainant have leave to contest before the master the right of any person claiming to be a *bona fide* holder of any of such bonds.

"And it is further ordered that any person who may be a *bona fide* holder and entitled to any of the bonds or coupons secured by said consolidated mortgage, be permitted to intervene and contest before the master any claim of any other person to be the *bona fide* holder of any of such bonds or coupons claimed to be outstanding, and that the master take proof and report as to the ownership of any bonds so contested before him, and also as to the ownership of any coupons which may be or may have been attached to any of said bonds secured, or claimed to be secured, by said consolidated mortgage, of which coupons the ownership may be contested before him. And for the better discovery of the matters aforesaid, the parties are to produce before the said master, upon oath, all deeds, books, papers, and writings in their custody or power relating thereto, and are to be examined, etc., as the said master shall direct.

"And the consideration of all further questions in the cause is reserved; and it is further ordered that the complainant shall be at liberty to apply to this court, or to either of the judges at chambers, at any time as it may be advised, for any further order in the premises."

The cause was soon afterwards settled by the parties, and the bill voluntarily dismissed by the complainant.

UNITED STATES v. WHITTIER.

1. The act of congress of July 12th, 1876 (19 Stats. at Large, 90), in respect to mailing obscene books, etc., construed, and *held* not to extend to the case of a sealed letter written by the defendant to a person who had no existence, in answer to a decoy letter of a detective, and which on its face gives no information of the prohibited character.
2. The cases in which it is allowable to make use of decoy letters discussed.

(*Before* DILLON and TREAT, JJ.)

Postal Laws as to Obscene Literature Construed.

THIS is an indictment founded on an act of congress, approved July 12th, 1876 (19 Stats. at Large, 90), which provides that: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, writing, print, or other publication of an indecent character, and every article or thing designed or intended *for the prevention of conception* or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means, any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, and every letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms, or language may be written or printed, are hereby declared to be nonmailable matter, and shall not be conveyed in the mails, nor delivered from any post-office, nor by any letter-carrier; *and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable matter*, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty of a misdemeanor, and shall, for each and every offence, be fined

not less than one hundred dollars nor more than five thousand dollars, or be imprisoned at hard labor not less than one year nor more than ten years, or both, at the discretion of the court."

The indictment charges, in substance, that there was delivered to the defendant, in the city of St. Louis, on ——, etc. (naming the time), a certain written letter, contained in an envelope, in the words following, namely:

"BUTLER, GA., Nov. 14th, 1877.

"*Dr. Whittier:*

"Can you furnish me an absolutely sure way to prevent conception? What will it cost? How can I get it? What is the price of your 'Marriage Guide?'

"Address,

"MISS NETTIE G. HARLAN,

"*Butler, Georgia.*"

Which letter, on the envelope, was addressed thus:

"DR. WHITTIER,

"*St. Louis, Mo.,*

"*No. 617 St. Charles St.*"

The question before the court arises on a motion by the defendant to quash the indictment, and, for the purpose of determining the law of the case, the parties have agreed that the facts in respect to the allegations in the indictment are as hereinafter stated, and that these facts are to be considered by the court on the motion to quash the indictment as if they were alleged in it, namely: That the letter described in the indictment as having been written by Miss Nettie G. Harlan, at Butler, Georgia, was in fact written by Robert W. McAfee, who then was, and still is, the agent of a society known as The Society for the Suppression of Vice, and that in the acts done by him, as herein set out, he was acting as such agent; that there is no such person as Nettie G. Harlan; that, by and with the consent of the United States postal officers, the said letter was enclosed in a sealed envelope, addressed as in the indict-

ment described, having a three-cent postage stamp upon the face thereof, and said envelope upon its face was postmarked "Butler, Georgia, November 14th;" that said letter was not mailed as postmarked, at Butler, Georgia, but was postmarked at St. Louis, Missouri, with a marking-stamp furnished said McAfee by the secret service of the United States post-office department, and that said postmark was affixed by the said McAfee, with the said marking-stamp so furnished, in the presence, and with the consent, of the said officers; that thereupon said letter, in said envelope so sealed, postmarked, addressed, and stamped, was by said McAfee delivered to the officers of the St. Louis post-office, and by them placed in the mail, and, in due course of mail, was delivered by James Haran, a letter-carrier of the postal service of the United States, from the post-office in St. Louis, at the office of the defendant, in the city of St. Louis, No. 617 St. Charles street, and that the same was there received by a person having charge of said office; that said letter was written and sent in the manner aforesaid for the purpose of procuring information whether the defendant was engaged in the business of sending through the mail non-mailable matter, and information, also, as to where, how, and by whom, or by what means, the matters, articles, and things declared by the acts of congress as non-mailable were being obtained.

It is further stipulated, for the purpose of the motion to quash the indictment, that the letter charged in the indictment as having been written in reply to the said letter of Miss Nettie G. Harlan by the defendant was by the defendant deposited, or caused to be deposited, in the St. Louis post-office, and the same was never sent to Butler, Georgia, nor delivered to Miss Nettie G. Harlan; but the said letter was taken out of the said St. Louis post-office by the postal officers, or said McAfee, for the purpose, singly and solely, of procuring information aforesaid, and detecting the defendant, if guilty of carrying on the business of knowingly depositing, or causing to be deposited, non-mailable matter in the United States mail. The allegation in

the indictment is that the defendant answered the letter which he received, purporting to be from Miss Nettie G. Harlan, and deposited his answer, contained in an envelope, in the post-office at St. Louis, and that the letter thus written and deposited by the defendant in the post-office is in the words following, namely:

"*Miss Nettie G. Harlan, Butler, Ga.:*

"I have what you desire. It is perfectly safe, sure, and healthful, and can be easily used. The price is ten dollars, sent by express only on receipt of price. Price of 'Marriage Guide' is fifty cents.

"Respectfully,

"C. WHITTIER, M. D."

The indictment then proceeds to aver that said letter was knowingly deposited by the said defendant in the post-office at St. Louis, *and then and there gave information in the manner and form aforesaid*, that a certain article or thing designed and intended for the prevention of conception (a more particular description of which said article said jurors are unable to give) might be obtained from him, the said Clarke Whittier, contrary to the form of the statute in such case made and provided.

On the indictment, as thus framed, in connection with the foregoing facts, which it is stipulated shall, for the purpose of this motion, be considered as a part of the indictment, with the same effect as if they had been alleged therein, a motion is made to quash; and the question which counsel desire to have decided is, whether, if these facts appear as they are alleged and agreed to exist, the prosecution can be sustained, under this statute, for the offence charged in the indictment.

W. H. Bliss, district attorney, and *J. P. Ellis*, for the United States.

D. P. Dyer and *David Wagner*, for the defendant.

DILLON, *Circuit Judge.*—The question submitted has given the court some difficulty. Certain propositions and principles will aid in its correct decision:

United States *v.* Whittier.

1. Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If this rule is lost sight of, the courts may hold an act to be a crime when the legislature never so intended. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. (*United States* v. *Morris*, 14 Pet. 694; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Clayton*, 2 Dillon, 219.)

2. Congress has, it is conceded, no power to make criminal the using of means to prevent conception, or to procure abortion, etc., in the several states. That power belongs to the respective states. But congress has plenary power over the mails and postal service, and may, undoubtedly, declare what shall not be mailable matter, and punish violation of its criminal enactments in this regard. The protection of the public morals in such cases is incidental to the protection of the mails. (*United States* v. *Botts*, 11 Blatchf. 346; *Re Jackson*, U. S. Sup. Ct. Oct. term, 1877.) The statute upon which this indictment is founded must be construed with reference to this limitation upon the federal function and the supposed federal purpose in the enactment of the statute. Congress meant by this legislation to prevent the mails from being used to transport matter corrupting to the public morals. (*Re Jackson, supra.*)

3. Where persons are suspected of being engaged in the violation of criminal laws, or of intending to commit an offence, it is allowable to resort to detective measures to procure evidence of such fact or intention. Many frauds upon the postal, revenue, and other laws are of such a secret nature that they can be effectually discovered in no other way. Accordingly, there have been numerous convictions upon evidence procured by means of what are called decoy letters—that is, letters prepared and mailed on purpose to detect the offender—and it is no objection to the conviction, when the prohibited act has been done, that it was discovered by means of letters specially prepared and

mailed by the officers of the government, and addressed to a person who had no actual existence. The books contain many cases where such convictions have been sustained. (*United States* v. *Cottingham*, 2 Blatchf. 470; *Regina* v. *Rathbone*, 2 Moody, Crim. Cases, 310; s. c. Carr. & M. 220; *Regina* v. *Gardner*, 1 Carr. & K. 628; *Regina* v. *Williams*, *Ib.* 195; *Regina* v. *Mence*, 1 Carr. & M. 234.)

There is a class of cases in respect of larceny and robbery in which it is held that where one person procures, or originally induces, the commission of the act by another, the person who does the act cannot be convicted of these particular crimes, although he supposed he was taking the property without the consent, or against the will, of the owner. (Archbold Crim. Pr. and Ev. 364; *Rex* v. *Eggington*, 2 Bos. & P. 58; *State* v. *Covington*, 2 Bailey [S. C.], 569; *Dodge* v. *Brittain*, Meigs [Tenn.], 84, 86; *Alexander* v. *State*, 12 Texas, 540; 3 Chitty, Crim. Law, 925; 2 East P. C. 665; 1 Bish. Crim. Law [5th ed.], secs. 262, 263.) The reason is obvious, viz.: The taking in such cases is not against the will of the owner, which is the very essence of the offence, and hence no offence, in the eye of the law, has been committed. The offender may be as morally guilty as if the owner had not consented, but a necessary ingredient of legal guilt is wanting. This is strikingly shown by *Rex* v. *McDaniel*, Foster, 121, s. c. 2 East P. C. 665, where "Salmon, McDaniel, and others conspired to procure two persons, ignorant of the design, to rob Salmon on the highway, in order that they might obtain the reward at that time given for prosecuting offenders for highway robbery. Salmon, accordingly, went to the particular place fixed upon, with some money, and the two men who were procured, being led there by one of the conspirators, robbed him, and they were afterwards prosecuted and convicted; but the conspiracy being afterwards detected, the conspirators were indicted as accessories before the fact to the robbery, and, the facts being found by a special verdict, the case was argued before all the judges, who held that the taking of Salmon's money was not a larceny,

being done not only with his consent, but by his procurement." But this principle must be limited to the cases where the consent will, as a matter of law, neutralize the otherwise criminal quality of the act. (1 Bish. Crim. Law [5th ed.], sec. 262.) Thus, where a prosecution was founded on an act of the legislature imposing a penalty on any one who should deal or traffic with a slave without a written ticket or permit from the owner, it is held that the offence is consummated, although the trading was done by the slave in pursuance of instructions of the owner, and in his presence, when the accused was ignorant of such instructions and presence. The reason is that, "like *Eggington's Case*, *supra*, this is a contrivance to detect the offender." (*State* v. *Covington*, 2 Bailey [S. C.], 569, 573; see also *Regina* v. *Williams*, 1 Carr. & K. 195; *Regina* v. *Gardner*, *Ib.* 628.)

The facts in the case now under consideration show that the defendant is as morally guilty as if the letter he was answering had been written by a person seeking the prohibited information, and not by a detective. But I am of the opinion that these facts do not clearly bring the case within the particular clause of the statute on which the indictment is founded. The indictment charges that the defendant knowingly deposited in the mail a letter *giving information* where, how, and of whom an article or thing designed and intended to prevent conception could be procured. This was in answer to a fictitious letter of inquiry. The letter written and mailed by defendant was addressed to a person who had no existence. *On its face it did not show that it was within the prohibited statute.* If it had been suffered to go through the mail to the place to which it was addressed, it would not have been called for, but would have been sent to the dead-letter office, and could not have given to any person the prohibited information. The defendant doubtless intended to give the inhibited information, but the statute does not apply to a letter merely intended by the writer to give such information, but to a letter "'actually' giving the information." If a letter of inquiry seeking the prohibited information

had been written by an actual person, although under a feigned name, an answer in reply, giving such information, would present a case distinguishable, it would seem, from the one under consideration.

I place my judgment in this case upon the single ground that the sealed letter written by the defendant, addressed to a person who had no existence, and which *on its face gave no information of the prohibited character*, and which is brought within the statute only by the fictitious letter of inquiry written by a detective, is not the "giving of information" within the meaning of the statute. At all events, it is not certain that congress intended to punish such an act; and, therefore, upon the principle above mentioned, that criminal statutes are not to be extended by judicial construction to cases not clearly and unmistakably within their terms, my judgment is that this prosecution, on the admitted facts, cannot be sustained. It is a case of clear moral guilt, but not of legal criminality. There is no legal crime committed, although the defendant did not know of the fact which deprived his act of its criminal quality. (1 Bish. Crim. Law [5th ed.], sec. 262.) In this respect the case falls within the principle strikingly illustrated by *Rex* v. *McDaniel*, above referred to.

In order to prevent misconception of the decision now made, it may be proper to add that we only decide the narrow and single point that the letter written and deposited by the defendant did not give the prohibited information, and hence is not within the statute. It would present a different case for consideration if the letter written and deposited by the defendant had been capable, into whosesoever hands it might have fallen or come, of imparting the prohibited information.

We do not decide that decoy letters cannot be used to detect persons engaged, or suspected to be engaged, in violating criminal laws, but recognize the doctrine that such letters may be so used. We only decide that the defendant, by his answer to the decoy letter, did not, under the special circumstances of the case, bring himself within the criminal prohibition of the act of congress.

It would also present a different case if the letter of inquiry had been written by some person actually seeking the prohibited information for immoral purposes, although written under an assumed name, and the defendant had mailed such a letter as he actually wrote and deposited in this case. Congress has not, and probably cannot, make the business in which it is claimed the defendant is engaged, viz., of furnishing to whoever may apply therefor the means of preventing conception, to procure abortion, etc., illegal, and punish the same; but the state of Missouri may do so. If the state has done so, and the defendant is suspected of being engaged in the illegal business, undoubtedly decoy letters may be used for the purpose of discovering his violation of the law, as the cases above cited show. And if, in answer to a decoy letter, the prisoner deposits in the mail any written or printed card, circular, etc., which on its face gives information of the prohibited character, there is nothing in this decision which precludes us from holding such a case, if it should arise, to be within the act of congress.

On the admitted facts, I am of opinion, for the reasons above given, that the prosecution cannot be maintained.

TREAT, J., *concurring.*—The questions involved in this case are extremely difficult of solution. It is necessary to discriminate with care, on the one hand, between the offence charged against the postal laws and the modes of proving the same, and, on the other hand, the offence stricken at by state statutes and the moral wrong and outrages implied in the vocation or business denounced.

The sense of indignation against such vocation or conduct should not permit a violation by the courts of established rules of law, or an unlawful exercise of jurisdiction, nor the countenance of unlawful contrivances to induce or manufacture crime. The postal system is designed by statute, for obvious reasons, to observe and enforce the sanctity of private correspondence. Severe penalties are denounced against all who intercept letters, etc., with a view of prying into their secrets. (Rev. Stats. sec. 3892.)

Section 3893, as amended (vol. 19, p. 90, chap. 186), under which this indictment is found, prohibits the conveyance through the mails, or delivery from any post-office, or by any letter-carrier, of any printed circular, or notice of any kind, giving the inhibited information, directly or indirectly. It then proceeds as follows: "And any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, any such non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall be deemed guilty," etc.

Thus the section provides for two classes of offenders, viz.: Those who deposit knowingly, for mailing or delivery, such non-mailable matter, and also those who knowingly take the same from the mails for the purpose stated. The various acts of congress *in pari materia* must be considered in connection with constitutional limitations. It is for preserving the purity and privacy of the postal service that congress has passed the many laws to which reference is made; yet, if non-mailable matter is not to be delivered, how are the contents of a sealed letter to be ascertained?

It must be conceded that contrivances to induce crime (the contriver confederating for the purpose with the criminal) are most rigidly scrutinized by the courts, even when the contrivances are lawful in themselves. But when the contrivances are of an unlawful character, should courts not be even more strict?

Again: The statute denounces the deposit of forbidden matter in the mails which "gives" (not which is intended or designed to give) "information, directly or indirectly," etc. In this case the letter deposited did not, of itself, give any such inhibited information; it was not addressed to any person in existence, and if, in the ordinary course of the mails, it had reached its destination, it would have been delivered to no one, for there was no one to whom to deliver, but would have passed to the dead-letter office. To make the letter bear an interpreta-

tion against the prohibitions of the statutes, it is necessary to examine the same in connection with the fictitious or decoy letter, bearing simulated postmarks, and also to say that the letter addressed to the fictitious person could, despite section 3892, be lawfully taken from the mails after it was deposited therein, and before it had been delivered to the person to whom addressed, "with the design of prying into the business or secrets of another."

No case, after most diligent search, has been found which disposes exactly of the point under consideration. In my judgment, it must be settled in the light of elemental principles.

No court should, even to aid in detecting a supposed offender, lend its countenance to a violation of positive law, or to contrivances for inducing a person to commit a crime. Although a violation of law by one person in order to detect an offender will not excuse the latter, or be available to him as a defence, yet resort to unlawful means is not to be encouraged. When the guilty intent to commit has been formed, any one may furnish opportunities, or even lend assistance, to the criminal, with the commendable purpose of exposing and punishing him. But no case has been found which goes beyond these views. There are legitimate means and jurisdictions where offences can be tried and punished, and the public weal is best subserved where rigid adherence thereto is enforced.

MOTION SUSTAINED.

PHELAN, Assignee of Central Savings Bank, *v.* HAZARD.

1. Unless prohibited by statute, an agreement between the incorporators of a company and the directors, by which the former convey to the company property needed for the purpose of its operations, and receive payment therefor in full-paid shares of the stock of the company, is, in the absence of fraud, binding upon the parties, and such stock is full-paid stock.
2. Whether subsequent creditors of the company can impeach such transaction as respects shares of stock which purport to be full-paid

shares, when they are in the hands of a subsequent registered transferee for value, and who purchased the same as full-paid shares, relying upon the certificates and the records of the corporation that full payment therefor had been received by the company, *quære?*

3. The petition of a creditor of the company which had become insolvent and dissolved was held not sufficient to open an inquiry into the transaction between the corporators and the company as to the value of the property conveyed to the company in payment of shares, with a view to hold a shareowner for the difference between the agreed value and the actual value of the property conveyed.

(*Before* DILLON and TREAT, JJ.)

Liability of Shareholders in Corporations.—Payment in Property.

THE plaintiff is a creditor of the La Motte Lead Company, in which the defendant is a shareholder.

The plaintiff in his petition alleges that the said company was incorporated as a manufacturing and business corporation under the laws of Missouri (1 Wag. Stats. 332); that said company issued to Rowland G. Hazard, John G. Copelin, William A. Scott, and R. B. Lockwood all of the stock it ever issued, of which said Rowland G. Hazard received and held eleven hundred and twenty-five shares, and on the 25th day of October, 1873, transferred eleven hundred and twenty-four of said shares to the defendant, Rowland Hazard, which he still holds, and *that said shares have never been paid for by any person to the said company, in whole or in part, but remain wholly unpaid.* The petition then alleges that the Central Savings Bank, of which the plaintiff is the assignee, owns and holds certain unpaid promissory notes of the said La Motte Lead Company, dated in April, June, August, and September, 1873; that suit was brought thereon within one year after the same became due (1 Wag. Stats. sec. 13, p. 336), and that there is due thereon to the plaintiff, from the La Motte Lead Company, $110,000; that there has been no meeting of the directors of said company since March 10, 1871, and that said company, before and at the time the said notes fell due, was, and still is, insolvent, and without property, and that it has

wholly ceased to do business. The petition also states that, by the laws of Missouri, the defendant is liable for the plaintiff's debts aforesaid to the extent of the par value of said eleven hundred and twenty-four shares; wherefore the plaintiff demands judgment against the defendant, Rowland Hazard, for the amount of his said debt against the La Motte Lead Company.

The answer admits the incorporation and organization of the La Motte Lead Company, as alleged; that Rowland G. Hazard was an original subscriber for stock, and received eleven hundred and twenty-five shares; that he transferred eleven hundred and twenty-four shares thereof to the defendant, Rowland Hazard. The answer denies that the said shares were not paid for, and avers that said company was *paid for the same in full* at the time the certificates of stock were issued; that they were issued as full-paid stock, and that the records and books of the corporation so showed, on the faith of which the defendant bought of the said Rowland G. Hazard the said eleven hundred and twenty-four shares for value as full-paid stock, and the same was transferred to him on the books of the company.

Such were the issues joined, so far as it is now material to state them.

On the trial the facts stated in the charge of the court to the jury appeared.

The charge of the circuit judge to the jury, as taken down by the stenographer, was as follows:

"*Gentlemen of the Jury:*—Mr. Lockwood, Mr. Scott, and Mr. Rowland G. Hazard in 1869 owned certain real estate, supposed to be mining property, and known as the Mine La Motte property. They owned it subject to certain mortgages—a mortgage to Fleming for $525,000 on five-sixths of the property, which was a first mortgage, and a mortgage to one Valle on the other one-sixth for about $40,000, or for a considerable sum of money; and the said Rowland G. Hazard held a second mortgage on the property for about $50,000. While the property

was in this condition, Lockwood, Scott, and Grant, under the statute of Missouri, framed articles of incorporation to incorporate themselves as the Mine La Motte Company, the name being subsequently changed to the La Motte Lead Company, and in the articles of incorporation the said Rowland G. Hazard, the said Lockwood, and the said Scott were named as directors. When the corporation had been thus organized, the said Lockwood, Scott, and Rowland G. Hazard made a contract with the directors of this company, they being the directors, and the only directors, whereby they agreed to convey the property, subject to these mortgages, to this newly-formed organization, for the consideration of $300,000. The directors of this corporation agreed to purchase it at that rate, and pay for it by the issue of full-paid stock to the vendors. A deed was made by the vendors and accepted by the company, and full-paid stock issued as follows:

	Shares.
To the said Rowland G. Hazard	2,250
" " " B. B. Lockwood	375
" " " W. A. Scott	375
Making in all	3,000

And certificates were issued for full-paid stock accordingly. The only payment made for this stock was the execution of a deed by Hazard, Scott, and Lockwood to the corporation for an expressed consideration of $300,000, and reciting therein the incumbrances above referred to. One of the certificates of stock held by the defendant is as follows:

"'*Organized under the Laws of the State of Missouri.*

"'*Full-Paid. Non-Assessable.*

"'*La Motte Lead Company.*

"'*50 Shares—Shares $100 each. Capital, $1,000,000.*

"'This is to certify that Rowland Hazard is the owner of fifty (50) shares of the capital stock of the La Motte Lead Company, transferable only on the books of the company in person or by attorney on surrender of this certificate.

"'(Signed.) ————————, *Secretary.*

"'————————, *President.*

"'MINE LA MOTTE, MO., October 25th, 1873.'

"The company adopted a by-law as follows:

"'The stock of the company shall be assignable or transferable at its office by any holder thereof, either in person or by regularly appointed attorney, in the presence of the treasurer or secretary, or one of the directors.'

"The books of the lead company, under date of December 3d, 1869, show that, on motion, it was

"'*Resolved*, That the company proceed to the purchase of a tract of land called Mine La Motte, and the pine lands, agreeably to the proposal for the sale thereof submitted by the owners, and now standing in the names of Bradley B. Lockwood and William A. Scott, and that the secretary be directed to receive a conveyance therefor.'

"The deed was received and recorded, and subsequently reported to the corporation. Of this $1,000,000 of capital stock, only $300,000 were ever subscribed or issued. The defendant purchased from said Rowland G. Hazard, in good faith, for value, eleven hundred and twenty-four shares of this stock, which he now holds, and which were transferred to him on the books of the company.

"On these facts, gentlemen of the jury, the plaintiff, in this form of action, and under the averments made in the petition, is not entitled to recover, and it is not competent for the plaintiff in this case to establish a liability on the part of the defendant by showing, in point of fact, that the property originally conveyed by Lockwood, Scott, and Rowland G. Hazard to the company was not worth $300,000, or that it was not worth anything over and above the mortgages upon it at the time of the transfer to the company in payment of the stock subscribed, even although the said corporation is insolvent and dissolved, as alleged in the petition."

TREAT, J., concurs.

The jury thereupon found a verdict for the defendant. The plaintiff moved for a new trial, on the ground that the foregoing charge was erroneous in point of law. The motion was overruled, for the reasons stated in the opinion of the court.

Messrs. Broadhead and *Conroy*, for the plaintiff.

Noble & Orrick, for the defendant.

DILLON, *Circuit Judge.*—The gravamen of the plaintiff's case is that the defendant is the holder, by transfer, of certain unpaid shares of stock in the La Motte Lead Company, and that, under the statutes of Missouri (1 Wag. Stats. p. 293, sec. 22), the plaintiff, as a creditor of that company (which is insolvent and dissolved), may compel the defendant to pay for the said shares held by him, or pay the balance due thereon. As between the transferrer of said shares and the corporation which issued them, it was agreed that the shares had been fully paid for by the transferrer to the company.

The charge to the jury was given without any opportunity to examine the law, and in accordance with what seemed, at the moment, to be the principle applicable to the case as made at the trial. Mr. Broadhead's argument at the bar for the plaintiff, in support of the motion for a new trial, tended to shake the impressions I had at the trial; and this, in connection with the importance of the case, in the amount as well as the principles involved, has induced me to look into the matter with some care and deliberation.

It will be observed that the petition charges no fraud in the agreement by which the corporation purchased the mining property and received a conveyance thereof, in payment for which, and as part of the same transaction, it issued its paid-up shares of stock. The records of the corporation showed the whole transaction—that it had received and recorded a deed for the property, and paid the consideration agreed upon by the issue of full-paid certificates of stock to the vendors. This was long anterior to the creation of the indebtedness to the plaintiff's assignor.

The plaintiff—a single creditor—does not for himself, or for himself and other creditors, file a bill to impeach as fraudulent this transaction between the corporation and the original shareholders; but he simply states that the shares of stock issued to Rowland G. Hazard have not been paid for, either by him or by the defendant, the transferee and present holder of the shares. Issue was taken on this averment, and the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz.: by a conveyance of the mining property to the corporation. This conveyance has been received and recorded by the corporation. Unless this agreement is rescinded or set aside for fraud, how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive, unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation, which showed the shares to have been fully paid for, and the manner in which the payment had been made.

Lord Justice MELLISH, in one case, seemed to be of opinion that a *bona fide* transferee of shares of stock which purported to be full paid, held the same exempt from a liability to be called upon to make payment therefor on the ground that the original subscriber had not fully paid for them. But it is not necessary, under the pleadings in this case, for us to consider or determine that question.

The cases are numerous in which such transactions as that which was entered into in this instance between the owners of the mining property and the corporation which they formed have come before the courts, and, in absence of fraud, have been sustained. (*Pell's Case*, Law Rep. 5 Ch. 11; *In re Baglan Hall Colliery Co. Ib.* 5 Ch. 346; *Maynard's Case, Ib.* 9 Ch.

60; *Schroeder's Case, Ib.* 11 Eq. 131; *Cleland's Case, Ib.* 14 Eq. 387; *Sichell's Case, Ib.* 3 Ch. 119; *Jones' Case, Ib.* 6 Ch. 48; *Forbes & Judd's Case, Ib.* 5 Ch. 270; *Pritchard's Case, Ib.* 8 Ch. 956; *Ferrao's Case, Ib.* 9 Ch. 355; *Bush's Case, Ib.* 9 Ch. 554; *Dent's Case, Ib.* 8 Ch. 768; *Corling's Case, Ib.* 1 Ch. 115; *Savage* v. *Ball,* 17 N. J. 142; *Smith* v. *North American, etc. Co.* 1 Nev. 423; *Goodrich* v. *Reynolds,* 31 Ill. 490; *Spense* v. *Iowa Valley, etc. Co.* 36 Iowa, 407, 411.)

The exigencies of the case now before the court do not require us to examine into the soundness or consistency of all these decisions. We shall refer to a few of them by way of illustration, and because, whatever else they hold, they clearly establish these propositions:

1. That such a transaction as that here in question is not *ultra vires,* and absolutely void.

2. That the contract is valid and binding upon the corporation and the original share-takers, unless it is rescinded or set aside for fraud, and that, while the contract stands unimpeached, the courts, even where the rights of creditors are involved, will treat *that* as a payment which the parties have agreed should be payment.

These propositions are decisive of the present case.

For the purpose above indicated, a brief statement of some of the English cases upon this subject will now be given.

In the origin, purposes, situation of the property, and fate of the company, the case of the *Baglan Hall Colliery Company* (Law Rep. 5 Ch. 346) is strikingly analogous to the case of the La Motte Lead Company. In the case just cited, nine persons bought a moiety of a colliery from Parker for £10,000, and the ten, after working it for some time, agreed to form a company for carrying it on, and a company was accordingly registered, the memorandum of association of which was subscribed by the owners of the colliery for numbers of shares proportioned to their respective interests; the nominal amount of shares subscribed for being £20,000. The memorandum of association stated nothing as to the shares being treated as paid-up

shares, but the articles of association provided that all the shares subscribed for in the memorandum should be treated as fully paid up. The colliery was made over to the company, but no other payment was made by any of the subscribers of the memorandum. No other shares than those subscribed for by the memorandum were ever allotted; and it was held (reversing the decision of MALINS, vice-chancellor) that the subscribers of the memorandum of the association were not liable as contributories, for *that the shares must be taken as having been fully paid up by the handing over the colliery.* In pronouncing his judgment on appeal, Lord Justice GIFFARD said: "Here was a colliery in which at first Parker was alone interested. He sold a moiety to certain gentlemen for £10,000, which was paid. The colliery was then subject to two mortgages, for £3,000 and £1,000. The owners went on working the colliery, not very successfully, and then determined to form a limited company, in order to avoid incurring further personal liability. It was the policy of the companies act to enable this to be done, and with the soundness of that policy we have nothing to do."

After stating that the colliery had been handed over to the company in consideration for the shares of the subscribers, the lord justice adds: "According to the decided cases, this, *in the absence of fraud,* was an effectual paying up of the shares in full. The test to be applied is this: Could the *company,* by any proceeding, have set aside the transaction by which it was arranged that the owners of the colliery were to have paid-up shares as the price of their interests in the colliery? And I say, on the evidence, that the company clearly could not. It was urged that the parties only agreed with themselves, and that therefore there was no contract. But every company is started by parties agreeing among themselves, and it is idle to say that they have nobody to agree with. There is nothing in the evidence to show that any person has been deceived. It appears probable that if the additional £3,000 which was raised by the last mortgage had been applied in working the colliery, the concern would have prospered." [The colliery had been sold by the mortgagee

under his power of sale for £4,500.] "The case is precisely the same as *Pell's Case* (Law Rep. 5 Ch. 11), and it must be held that the persons who subscribed the memorandum of association have paid all that they were bound to pay. Creditors have no ground for complaint, for persons who are about to enter into transactions of magnitude with an individual make inquiry into the state of his circumstances; and so, if they enter into them with a limited company, it is their own fault if they do not inquire into the nature of the memorandum and articles, and look to the register of shareholders. In this case there was no concealment, and it would, in my judgment, be a total misapplication of the act to say that a transaction like the present is not authorized by it. If strangers (no misrepresentation being made) choose to deal with a company without inquiry, they have no right to complain when it turns out that the shareholders are under no personal liability."

In *Pell's Case*, above referred to, "the master of the rolls," says Lord Justice GIFFARD, in the same opinion (Law Rep. 5 Ch. 355), "allowed the agreement between Pell and the company that he should hand over the property to the company, and that his shares should be taken as fully paid-up shares, to stand, so far as the value of the property went, but directed an inquiry as to its value. This was varied on appeal, and the agreement not being impeached, it was held that the shares must be taken as fully paid up by the handing over of the property."

Commenting on *Pell's Case*, Lord Chancellor HATHERLEY said: "The master of the rolls thought that Pell, being bound to pay the full amount of £20 per share, was not to be taken to have paid it in full unless the property he handed over was worth that amount. That result, however, could only be arrived at by rescinding the contract to buy Pell's business, and Lord Justice GIFFARD thought that the contract, not being impeached, must be treated as a good contract, and one that ought to be acted upon, so that no question could be raised as to the actual value of the business made over." (*Forbes & Judd's Case*, Law Rep. 5 Ch. 270–273; *Fothergill's Case*, *Ib.* 270; *Pritchard's Case*, *Ib.* 956.)

In *Schroeder's Case* (Law Rep. 11 Eq. 131), shares taken in a company were decided to be lawfully paid for in Confederate bonds, at the market price, and in tea which was required for the company's purposes.

In *Spargo's Case* (Law Rep. 8 Ch. 407), decided by the lord justices on appeal, the same doctrine was applied with reference to a company to which the companies act of 1867 (section 25) applied. That section in the act was in these words: "Every share in any company shall be deemed and taken to have been issued, and to be held subject to the payment of the whole amount thereof *in cash*, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at and before the issue of such shares."

Spargo's Case is thus stated by Vice-Chancellor MALINS in a subsequent similar case (*Coates' Case*, Law Rep. 17 Eq. 169, 177): "Spargo signed the memorandum of association for thirty-one shares, and he was, in consequence, liable to pay £1,550. It does not require the act of 1867 to show that such a person is liable for the amount for which he subscribes, and the vice-warden of the stannaries court put him on the list of contributories, considering that he had incurred a liability by signing the memorandum of association, which could only be discharged by payment *in cash*. But Spargo had also agreed to sell to the company the lease of a mine for £2,776, and in a settled account they gave him credit for the £2,776 as against the price of his shares. That was treated by the court of appeals as a good payment. The lease of the mine was the thing with which the company was trading, and so they gave him credit for that." And it was held that the aforementioned section 25 of the companies act of 1867 had not altered the law as to what would constitute a good payment for shares.

In *Coates' Case, supra*, the facts were shortly these: The memorandum of association of a company formed for the purpose of purchasing and carrying on the business before that time carried on by Coates was subscribed by Coates for twenty-five

hundred shares, which were of £1 each. It was also subscribed by other persons, by which the number of shares taken amounted to sixty-two hundred and sixty-five, out of a total capital of seventy-five hundred shares; and the company could only issue fresh shares by special resolution. The articles of association stated that an agreement had been prepared between Coates and the company for the sale of the business to the latter for £5,000, of which one-half was to be in fully paid-up shares of the company. This agreement was executed shortly after the registration of the memorandum and articles of association, and was filed with the registrar of joint stock companies. As between Coates and the company, the shares for which he signed the memorandum were treated as being the fully paid-up shares which he took as part of the purchase-money, and he was debited in the books with £2,500 due on the shares, and credited with £5,000 as the price of the business. Under these facts it was held that Coates was entitled, even as to creditors of the company, to treat the shares for which he subscribed the memorandum as the same shares as those for which he sold his business, and that the shares were paid for *in cash*, within the meaning of the 25th section of the act of 1867. "In truth, it appears to me," says Lord Justice JAMES (Law Rep. 8 Ch. 411), "that anything which amounted to what would be in law sufficient evidence to support a plea of payment would be a payment in cash within the meaning of this provision (section 25 of companies act of 1867). The object of the section was, I apprehend, to prevent such contracts as had been before the court in *Pettatt's Case* (Law Rep. 2 Ch. 527) and *Elkington's Case* (*Ib.* 511), in which a man was to take shares and to pay for them by supplying goods when wanted." Applying these principles to *Coates' Case*, above referred to, Vice-Chancellor MALINS (*Coates' Case*, Law Rep. 17 Eq. 169, 179) says: "It is perfectly clear that in this case the company had entered into a contract which would have justified their paying Mr. Coates £2,500 in cash. If they had fulfilled that contract they would have handed him bank notes or a check, which he would have

handed back again in discharge of the twenty-five hundred shares for which he signed the memorandum of association. * * * I am, therefore, of opinion that the transaction by which credit was given to Mr. Coates for the value of his business is precisely the same as giving Mr. Spargo credit for the value of his lease. It was settled in account, and they would have been justified in handing the money to him, and then he would have handed it back to them in payment of the calls on the shares for which he had subscribed the memorandum of association. I think, therefore, that Mr. Coates is not liable to pay anything on these shares." The case was one in which the official liquidator of the company, which had become insolvent, sought to enforce the alleged liability of Mr. Coates by having him placed on the list of contributories for twenty-five hundred shares in the company for which he had signed the articles of association.

Without pursuing the subject more at length, we are of opinion that the direction to the jury was right, and that the motion for a new trial must be overruled.

TREAT, J., concurs.

JUDGMENT ON THE VERDICT.

NOTE. — There are later decisions than those cited in the principal case, to the effect that the *bona fide* purchaser for value of shares issued by a corporation which falsely purport to be full-paid shares cannot be held liable to pay the same where it is not shown that he purchased with notice of the facts. (*Foreman* v. *Bigelow*, U. S. Cir. Ct. Dist. of Mass. Oct. 1878, before CLIFFORD and LOWELL, JJ., and where the later cases are referred to, including *Nichols' Case*, 26 Weekly Rep. 334; *Barkinshaw* v. *Nicholls*, *Ib.* 819; *Steacey* v. *Little Rock, etc. R. R. Co. post.*)

UNITED STATES v. THOMAS WALSH.

1. The Revised Statutes (sec. 5440), in respect of the crime of conspiracy to defraud the United States, change, in material respects, the offence of conspiracy as it existed at common law, and every ingredient of the offence must be clearly alleged.
2. An indictment charging an alleged conspiracy to defraud the United States to consist in "certifying that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of the United States custom-house and post-office in the city of St. Louis, and for labor performed on the said building, were true and correct," is bad for uncertainty.

(*Before* DILLON and TREAT, JJ.)

Conspiracy to Defraud the United States.—Revised Statutes, Section 5440, Construed.—Requisites of Indictment for Conspiracy under said Section.

ON MOTION by the defendant to quash the second count in the indictment, the first count having been abandoned by the government. The second count is as follows:

"And the jurors aforesaid, on their oaths aforesaid, do further present that, on the said 30th day of November, in the year of our Lord 1874, the said Thomas Walsh, being then and there superintendent of the construction of the new St. Louis custom-house and post-office, then in process of erection in the city of St. Louis, within said district, and the said William K. Patrick, being then and there assistant superintendent of construction of said building then in process of erection as aforesaid, did, at said district, conspire, combine, confederate, and agree together, and with certain other persons to said jurors unknown, to defraud the United States out of a large sum of money, to-wit, the sum of $50,000, by certifying, he, the said Thomas Walsh, as superintendent as aforesaid, and he, the said William K. Patrick, as assistant superintendent as aforesaid, that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of said new custom-house and post-office, and for labor performed on said

building, were true and correct; that afterwards, to-wit, on the 1st day of December, in the year aforesaid, in pursuance of and in order to effect the object of said conspiracy, combination, confederacy, and agreement so had as aforesaid, the said Thomas Walsh, of said district, as superintendent as aforesaid, did present to one John F. Long, then and there disbursing agent for the said new custom-house and post-office, then in process of erection in said city of St. Louis, within said district, certain written and printed papers, then and there purporting to be true and correct pay-rolls of mechanics and laborers employed on the said custom-house and post-office during the month of November, in the year of our Lord 1874, which said purported pay-rolls were then and there vouchers for the payment to be made by him, the said John F. Long, as disbursing agent as aforesaid, to certain persons to said jurors unknown, of a large sum of money then and there belonging to the United States, to-wit, $21,862.02, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The indictment is founded upon section 5440 of the Revised Statutes of the United States, which is as follows:

"If two or more persons conspire either to commit any offence against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than $1,000 and not more than $10,000, and to imprisonment not more than two years."

The question for consideration is, whether the second count of the indictment is sufficiently precise, specific, and certain in its statement of the offence to sustain a judgment on a verdict of guilty, if such a verdict should be found.

W. H. Bliss, district attorney, for the United States.

D. P. Dyer, *David Wagner*, and *William Patrick*, for the defendant.

DILLON, *Circuit Judge.*—We have examined all the cases cited in the arguments of the respective counsel, and many others, and we have considered the propositions they have advanced, and now proceed to announce, without much elaboration, the conclusions we have reached.

At common law the offence of conspiracy was complete whenever the unlawful concert and agreement was entered into and concluded, although nothing was done in pursuance thereto, or to carry it into effect. The gist of the offence was the unlawful agreement. The offence of conspiracy at common law being complete without an overt act, it was one of the few cases in which the law undertook to punish criminally an unexecuted intent or purpose to commit a crime. But such is the settled doctrine of the common law, and hence, in an indictment for conspiracy at common law, it is not necessary to allege any overt act, or to prove it, if it is alleged.

It is a settled doctrine in our jurisprudence that there are no common law offences against the government of the United States. An act or an omission, to be criminally punished in the federal courts, must be declared to be an offence by an act of congress. It follows that the act of congress must constitute the sole basis of the offence of conspiracy, and the section (Rev. Stats. sec. 5440) on which this indictment is founded, changes, in material respects, the offence of conspiracy as it existed at common law. This section not only makes the unlawful agreement to do the prohibited act essential to a completed offence, but also "that one or more of the parties to such conspiracy shall do some act to effect the object thereof." These considerations are important in determining the weight due to the English cases on the subject of the particularity and certainty necessary in indictments for conspiracy. The English courts have sustained indictments for conspiracy which were framed in the most general manner, and without alleging any overt acts. (*Rex* v. *Gill*, 2 Barn. & Ald. 204.) This laxity and departure from principle have been regretted in the more recent cases in that country, and have been sought to be remedied by giving to the defendant,

where the count is general and the charge indefinite, the right to call for a "bill of particulars." Examples of this may be found in *Regina* v. *Stapylton*, 2 Cox Crim. Cases, 69; *Rex* v. *Hamilton*, 7 Carr. & P. 448, and some other cases. We have no such anomalous practice in this country, and the settled doctrine of the American courts is, that an indictment for conspiracy, like all other indictments, "must inform the defendant of the nature and cause of the accusation" (Const: U. S. 6th amendment), and must set forth the offence with clearness and certainty.

"Every ingredient of which the offence is composed must be accurately and clearly alleged" (*United States* v. *Cook*, 17 Wall. 174). And in the recent case of the *United States* v. *Cruikshank* (2 Otto, 542, 557), these principles were applied by the supreme court of the United States to the case of an indictment for conspiracy. The judgment of court in the case last cited was that the indictment was bad for vagueness and generality, and because it lacked the certainty and precision required by the established rules of criminal pleading. In delivering the opinion of the court, the chief justice said: "The accused has, therefore, the right to have a specification of the charge against him, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment." And the supreme court cites and approves the decisions in New Hampshire (*State* v. *Parker*, 43 N. H. 83), Vermont (*State* v. *Keach*, 40 Vt. 118), Michigan (*Alderman* v. *People*, 4 Mich. 414), and Maine (*State* v. *Roberts*, 34 Me. 320), which reject the authority and soundness of the English decisions sustaining the sufficiency of vague and general counts in indictments for conspiracy. Among the cases cited by the supreme court of the United States was that of *State* v. *Parker* (43 N. H. 83), in which the requisites of an indictment for conspiracy and the course of decisions in England are considered with care and ability. After commenting on the English decisions, Chief Justice BELL says: "We are constrained to regard these de-

cisions, which are not authorities here, as of very little weight, because the reasons assigned for the leading case, on which all the others depend (if reasons they can be called), are weak and unsound, and none better have been suggested in any of those that followed, because it appears by Lord DENMAN'S opinion in *Queen* v. *Kendrick* (5 Ad. & E. [N. S.] 49), that eminent judges have regretted the decisions as dangerous to the accused, because the courts have found themselves compelled to supply the defects of such indictments by bills of particulars, which is conclusive that, in the opinion of such judges, the indictments did not state the crime or offence so 'fully and plainly, substantially and formally' (N. H. Bill of Rights, sec. 15), that a party ought not to be put upon his trial until its defects were supplied. We infer from the repeated instances in which the courts have been called to reaffirm these decisions, that the judgment of the bar revolts at them as unsound, and we draw the same inference from the fact that, out of the decisions we have found since 1819, no less than four are in conflict with the cases we have here cited. These are: *Rex* v. *Richardson*, 1 Man. & R. 402, in 1825; *Rex* v. *Fowle*, 4 Carr. & P. 592, in 1830; *Rex* v. *Buis*, 1 Ad. & E. 327, in 1834; and *Regina* v. *Peck*, 9 Ad. & E. 686, in 1839. The same question has arisen in the courts of Massachusetts, Maine, New York, and Michigan, and has been decided with reference to the English decisions, as we think, more in accordance with the general principles of the law."

The views of the supreme court of Vermont in the case of *State* v. *Keach* (40 Vt. 113), cited by the supreme court of the United States, and of the supreme court of Massachusetts (*Commonwealth* v. *Hunt*, 4 Metc. 111; *Commonwealth* v. *Eastman*, 1 Cush. 189; *Commonwealth* v. *Shedd*, 7 Cush. 514), and of the supreme court of Pennsylvania (*Commonwealth* v. *Hartman*, 5 Barr), are to the same effect, and equally pointed and decisive. See, also, Archbold Crim. Pl. and Ev. (6th Am. ed.) 620, and cases cited.

The principles laid down by the supreme court of the United

States in the case of the *United States* v. *Cruikshank*, *supra*, cover every question which arises as to the sufficiency of the second count of the indictment now under consideration. Let us turn to this count and see what it alleges against the defendants: [Here the court read this count, as is above set out.] This count is divisible into two parts: first, the conspiracy portion; second, the portion which charges what is termed the "overt act"—*i. e.*, "the act done" by the defendants "to effect the object of the conspiracy." The conspiracy to defraud the United States is alleged to consist in "certifying that certain false and fraudulent accounts and vouchers for material furnished for use in the construction of the said custom-house and post-office, and for labor performed on said building, were true and correct." What can be more general and indefinite than this? It is not alleged that the conspiracy was to certify falsely all accounts and vouchers for material and labor for the building, but to certify "that certain false accounts and vouchers for material and labor were true and correct." This is all. But what accounts and what vouchers, is not alleged. How does this advise the defendant so as to enable him to make his defence; what accounts or what vouchers are to be impeached? How can the court know, if a trial is gone into under this indictment, whether the accounts and vouchers offered in evidence by the government are the same ones in respect to which the grand jury found the bill of indictment. (*Lambert* v. *People*, 9 Cow. 578.) If the defendants are convicted or acquitted on an indictment so general and uncertain, how can they plead the judgment in bar of another prosecution? How does it appear that the accounts and vouchers were such as that an intent to defraud the United States can be predicated of them? No dates, sums, amounts, persons, or materials are mentioned, and it does not appear that this could not be done, for the allegation is that the conspiracy related to "certain false and fraudulent accounts." We agree with the supreme court of Pennsylvania, in the case cited, that "precision in the description of the offence is of the last importance to the innocent," and hence the

importance of the decision of the United States supreme court in the Cruikshank case, which settles the law for all the courts of the United States.

This indictment does not advise the defendants what they will have to meet, and they cannot tell from it which of the multitudinous vouchers and accounts they have certified will be relied on by the government to establish the charge.

This is an indictment for conspiracy to defraud the United States, and the American decisions are uniform to the point that the means by which the fraud is to be effected must be described in some part of the indictment with certainty. (*United States* v. *Ulrici*, 3 Dillon, 532, 536; *State* v. *Parker*, *supra*; *State* v. *Keach*, *supra*; *Commonwealth* v. *Hunt*, *supra*; *State* v. *Roberts*, *supra*.) Nor is the uncertainty in the present indictment helped out by the averments with respect to the overt act. It is charged in this behalf that the defendants presented to the disbursing agent of the United States certain written and printed papers, purporting to be true and correct pay-rolls of mechanics and laborers on the building for the month of November, 1874, which were vouchers for the payment of the sum of $21,862.02. But it is not alleged that these pay-rolls were false or not true, and much less that the defendants knew them to be so. The averments in respect to the overt act do not show any criminal offence in connection with those pay-rolls, and, hence, we say that they cannot, in any view, aid the defects in the conspiracy portion of the count. (*The Queen* v. *King*, 7 Ad. & E. [N. S.] sec. 782.)

We have gone into this matter thus fully, so that the counsel for the government should be advised of the views of the court to guide his further action.

I am authorized to state that TREAT, J., fully concurs in these views.

JUDGMENT ACCORDINGLY.

JOHNSON, Receiver, *v.* LAFLIN *et al.*

1. Under the national banking act, a shareholder has the right to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferrer's liabilities in respect thereto; and, in the absence of fraud, this right is not subject to a veto by the directors or the other shareholders.
2. Where such a sale of shares is made, and the transfer entered on the books of the bank, the transferrer ceases to be a shareholder, and is freed from liability in respect of such shares.
3. The provision of the national banking act (Rev. Stats. sec. 5139), that shares shall be "transferable on the books of the association," construed, and *held* not to give the directors the power to refuse to register a *bona fide* transfer of stock without some valid and sufficient reason for such refusal.
4. As between the seller and purchaser of shares in a national bank, the sale is complete when the certificate of the shares, duly assigned, with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller; and either the purchaser or seller may compel a registration of the transfer on the books of the bank, unless the bank has some valid and sufficient ground for refusing to register the transfer.
5. The defendant, Laflin, owning full-paid shares of stock in a national bank of which his co-defendant, Britton, was the president, employed a broker to sell the same in the market. The broker, without Laflin's direction or knowledge at the time, sold the same at the market value to Britton, individually, and received in payment his individual check on the bank for the purchase price, and delivered to the purchaser the share certificates assigned in blank, with blank powers of attorney thereon endorsed, authorizing the transfer of the shares on the books of the bank. Subsequently, after the amount of the check had been collected, but on the same day, the president, without the knowledge of Laflin or the broker, directed the book-keeper of the bank to credit his individual account with the amount of the check which he had given for the shares, and to transfer the shares (the book-keeper inserting his own name in the blank power of attorney as attorney to make the transfer) to Britton, "trustee," not specifying for whom he was trustee, and charging the sum to the "sundry stocks account" of the bank, all of which was done. The bank, although it had not committed any act of insolvency, was then insolvent; but this fact was not known by Laflin or the broker: *Held*, That, although the bank, or its officers for it, were prohibited

from purchasing its own shares (Rev. Stats. sec. 5201), yet that Laflin, having sold in good faith, without notice of the illegal purpose of Britton in buying the stock, or of his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment for the shares.

(*Before* DILLON, *Circuit Judge.*)

National Banks. — Rights and Liabilities of Shareholders. — Elements of Complete Transfer.

THE plaintiff is the receiver of the National Bank of the State of Missouri, appointed June 23d, 1877, by the comptroller of the currency. That bank suspended payment and closed its doors June 20th, 1877.

The defendant Laflin had for some years prior to May 16th, 1877, been the owner of eighty-five shares of full-paid stock in that bank, but was not a director. The defendant Britton was the president of the bank.

On the 10th day of May, 1877, Mr. Burr, the president of another bank, in which Laflin was a director, wrote a letter to a correspondent who was the owner of stock in the National Bank of the State of Missouri, stating (without giving the grounds of his advice), "you had better sell your stock in that bank, because you can buy it back again at a profit if you wish to do so." Mr. Burr casually showed Laflin this letter and said, "go and do likewise." An election was to be held for directors on the 29th day of May, 1877, which it was supposed would give the stock a greater value in the market before the election than it would have after that event.

Acting upon this general advice of Mr. Burr, and without personal knowledge of the actual financial condition of the bank, Laflin, on the 16th day of May, 1877, authorized one Keleher, a broker, to sell in the market his eighty-five shares of stock. Keleher sold the same at private sale for $5,037.50 to James H. Britton, who then was, and for some years had been, the president of the bank. Mr. Britton gave Keleher to understand that he was buying either for himself or a party whose

name he did not disclose. Britton paid Keleher the $5,037.50 by his individual check on the bank of which he was president, and Keleher thereupon delivered Britton the certificates for the eighty-five shares of stock, assigned in blank, together with a blank power of attorney endorsed thereon, signed by Laflin, authorizing the transfer of the stock on the books of the bank. The stock certificates contained this provision: "Transferable only on the books of said bank, in person or by attorney, on the return of this certificate, and in conformity with the provisions of the laws of congress and the by-laws which may be in force at the time of such transfer."

There were no by-laws on the subject of the transfer of stock. Keleher immediately presented Britton's check at the counter of the bank, and received thereon the $5,037.50, and deposited the amount in his own name with his own bankers, the Messrs. Bartholow, Lewis, & Co., upon whom he gave Laflin his own check for $4,995 — being the proceeds of the sale to Britton less his commission of fifty cents per share. Keleher did not inform Laflin to whom he had sold the stock, and even declined to do so. Laflin did not actually know that it had been sold to Britton until some time afterwards. Keleher supposed Britton was making the purchase for himself or some other person, and did not know that he was buying it as "trustee for the bank." After Keleher had delivered the stock certificates for the eighty-five shares, with the blank power to transfer endorsed thereon, and had collected the check and had left the bank, but on the same day, Britton delivered the stock certificates, assigned in blank, together with the blank powers of attorney signed by Laflin, to one E. Girault, the general book-keeper of the bank, with instructions to credit from the general funds of the bank Britton's individual account with the amount paid for the stock, viz., $5,037.50, which was done, and to charge the like amount in the books of the bank to "sundry stocks account," and to transfer the eighty-five shares on the stock transfer book to "James H. Britton, trustee." Girault obeyed these directions. The transfer of the stock on the transfer book was

accordingly made to "James H. Britton, trustee," not stating for whom he was trustee. But in the stock ledger the transaction was entered in an account entitled "James H. Britton, trustee for bank," meaning Britton's own bank. Girault, in making the transfer of the shares, filled in his own name as attorney in the blank powers of attorney signed by Laflin, and signed the transfer to Britton as trustee thus: "S. H. Laflin, by E. Girault, attorney." Girault had actual knowledge at the time that this stock had been paid for in the manner hereinbefore stated. No new certificates of stock for the eighty-five shares were ever issued to Britton or any one else. Neither Keleher nor Laflin knew of the foregoing direction of Britton to Girault, nor what Girault did in respect thereto. Other stock to a very large amount was from time to time purchased from other persons by Britton, and paid for in the same way, and transferred and entered in the same manner. No formal resolution of the directors appears authorizing this to be done, but the directors knew of, and assented to, Britton's acts in this regard.

At the time of the suspension of the bank, June 20th, 1877, there were, it seems, forty-five hundred and ninety-nine shares of its own stock standing in the name of "James H. Britton, trustee," which had been purchased by him with the funds of the bank, under circumstances more or less similar to the purchase from the defendant, Laflin.

All of the stock thus standing in the name of Britton, trustee, including that purchased from Laflin, was voted by him at the election of directors held May 29th, 1877. Britton had been for years the owner of a large amount of stock in the bank in his own name and right, and thus owned fifteen hundred and forty-two shares when the bank suspended. Britton's credit was good at the time of this transaction, and there was nothing in the nature of the transaction—in the fact of the purchase, the amount or mode of payment, or the price paid—calculated to awaken suspicion on the part of Keleher that it was not a regular transaction on Britton's own account. Laflin did not receive more than the stock was then considered to be worth in the

market. Laflin did not know that the bank was insolvent, and his firm continued to deposit money with it until it closed. Keleher testifies that he considered the bank "sound in all respects" when he made the sale to Britton. The bank had not at that time committed any act of insolvency.

This is a bill in equity by the receiver against Laflin and Britton to compel Laflin to pay back the $5,037.50; to set aside the transfer of the eighty-five shares of stock; to have Laflin declared to be still a stockholder in the said bank in respect of said shares, and to have Britton ordered to re-transfer the shares to Laflin on the books of the bank.

The bill as to Britton stands confessed. Laflin answered, denying the material charges in the bill. Replication was filed and proofs taken. The cause is before the court on final hearing.

The following provisions of the national banking act, taken from the Revised Statutes, are those which more directly relate to the questions arising in this case:

"SEC. 5139. The capital stock of each association shall be divided into shares of $100 each, and be deemed personal property, and be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies, or securities of the existing creditors of the association shall be impaired.

"SEC. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value, in addition to the amount invested in such shares. * * *

"SEC. 5201. No association shall make any loan or discount

on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, or, in default thereof, a receiver may be appointed to close up the business of the association, according to section 5234.

"SEC. 5204. No association or member thereof shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. * * * But nothing in this section shall prevent the reduction of the capital stock of the association under section 5143.

"SEC. 5152. Persons holding stock as executors * * * or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator * * * or person interested in such trust funds would be if living and competent to act and hold the stock in his own name.

"SEC. 5210. Requires a full and correct list of all the shareholders to be kept, subject to inspection of all the shareholders and creditors, and a verified copy of such list to be sent annually to the comptroller of the currency."

Henderson & Shields, for the plaintiff.

A. W. Slayback, for the defendant.

DILLON, *Circuit Judge.*—The plaintiff is the receiver of the National Bank of the State of Missouri, appointed by the comptroller of the currency June 23d, 1877, the bank having suspended payment three days before (Rev. Stats. sec. 5234). The defendant Laflin had for some years prior to May 16th, 1877, been the holder of eighty-five full-paid shares in that bank. At the date of the suspension of the bank the defendant, James H. Britton, was its president, and had been such for years

prior to that event. On the 16th day of May, 1877, Laflin sold, through one Keleher, a broker, the eighty-five shares of stock to Britton, and delivered to him the share certificates, duly assigned in blank, with powers of attorney in blank thereon endorsed to transfer the shares on the books of the bank. Laflin's broker, who effected the sale, understood that he sold to Britton individually, or to some unknown person for whom Britton acted, and he received in payment for the shares the personal check of Mr. Britton on the bank for $5,037.50, which was immediately presented and paid. Laflin did not know until some time after the transaction who had become the purchaser of his shares. After the shares had been thus delivered and paid for by Britton's check, and the money received, but on the same day, they were transferred, in pursuance of Mr. Britton's directions, by Mr. Girault, the book-keeper of the bank (by virtue of the powers of attorney from Laflin), to "James H. Britton, trustee," and at the same time the book-keeper credited Britton's individual account at the bank with the amount of his check given in payment for the shares, and charged the same amount to the "sundry stocks account" on the books of the bank. On the official stock register the shares were thus made to stand in the name of "James H. Britton, trustee," without stating for whom he was trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Neither Laflin's agent who negotiated the sale of the shares nor Laflin himself had any actual notice of the manner in which the transfer of the stock had been registered, nor that the funds of the bank had been thus used to pay for it, nor of the entries in respect thereto on the books of the bank. But of all these facts Mr. Girault, the book-keeper of the bank, who made the entries, and who had inserted his name in Laflin's blank powers of attorney to transfer the stock, had actual knowledge at the time.

This is a bill in equity by the plaintiff, as the receiver of the bank, against Laflin and Britton, to compel Laflin to repay the $5,037.50 (the amount of Britton's check for the shares paid by

the bank), and to set aside the registered transfer of the eighty-five shares on the stock transfer book of the bank.

The case presents questions of grave moment concerning the rights of stockholders and creditors in national banking associations. And if the insolvency of the bank here in question is such as shall make it necessary to enforce the individual liability of the shareholders (Rev. Stats. sec. 5151), it is important to those shareholders who made no sale of their stock to know who are shareholders with them, liable to contribute to meet "the contracts, debts, and engagements of the association." These questions principally depend upon the true construction of certain provisions in the national banking act, to which we shall refer as we proceed.

Inasmuch as this act in express terms prohibits a national bank from thus becoming a "purchaser of the shares of its own capital stock" (Rev. Stats. sec. 5201), if Laflin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been *ultra vires* and illegal, both as respects creditors and other shareholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if the bank were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. (*Re London, etc. Exchange Bank*, Law Rep. 5 Ch. 444, 452; *Great Eastern Railway Co.* v. *Turner*, *Ib.* 8 Ch. 149; *Currier* v. *Lebanon Slate Co.* 56 N. H. 262.) And although Laflin did not contract to sell his shares directly to the bank, or to the president for the bank, still, if, before the transaction was completed as to him, he had notice, actual or constructive, that the purchase was, in fact, a purchase for the bank, and paid for by the money of the bank, the transaction cannot stand, and the receiver may compel him to pay back the money thus received, and have him declared still to be a shareholder.

It would be easy to support these propositions by argument and by the authority of adjudged cases, but they are so plain that it is not necessary to do so. But Laflin, or his agent, Kele-

her, did not deal with the bank, or with the president, with knowledge that the latter in fact intended to pay for the shares out of the moneys of the bank. Laflin was acting in good faith. Neither he nor his agent, Keleher, had any actual knowledge of Britton's purpose to turn these shares over to the bank, and to pay for them out of the funds of the bank. If Laflin can be charged with notice, it must be constructive notice, arising either, first, from the mere fact that he was a shareholder in the bank, or, second, from the law imputing to him all the knowledge in this behalf which was possessed at the time by Mr. Girault, the book-keeper, who made the transfer of the shares on the transfer book of the bank under Laflin's blank powers of attorney, and who contemporaneously made the entries on the private books of the bank, which showed that Britton had been paid for the shares out of the general funds of the bank, and had acknowledged that he held the shares as the trustee of the bank.

The controlling question in the case is whether Mr. Laflin is affected with constructive notice in one or the other of these modes. The solution of this question, in its turn, depends upon the nature and extent of the right of a shareholder in a national banking association to transfer his shares, and also upon the elements or requisites of a completed transfer, by which is meant such a transfer as shall release the transferrer from liability to the bank, its stockholders, and creditors.

In considering these questions, our first proposition is that, under the national banking act, a shareholder has the unrestricted right to make an out-and-out *bona fide* and valid sale and transfer of his shares to any person or corporation capable in law of taking and holding the same, and of assuming the transferrer's liability in respect thereto.

The right to transfer shares in a corporation is usually recognized or given in express terms in the charter or constituent act, which also, not unfrequently, prescribes the manner in which the transfer shall be made. The capital stock of a corporation is invariably divided into shares of a fixed amount, for the pur-

pose, among others, of allowing it to be readily transferred. In an ordinary partnership the consent of all the partners to the admission or retirement of a member is necessary, and every such change involves the dissolution of the old and the formation of a new partnership. But in incorporated companies this is different. Indeed, it is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly, in this country shares in corporations are universally bought and sold without reference to the consent of the other shareholders.

The restrictions on the right *bona fide* to sell and transfer shares must be found in express legislative enactments or in authorized by-laws. The national banking act (Rev. Stats. sec. 5139), by providing that shares shall "be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association," recognizes the right of the shareholder to transfer his shares. There is nothing peculiar in this provision. A similar provision is found in nearly all the incorporating acts and charters in this country. The right to transfer is given or implied in the section just referred to (Rev. Stats. sec. 5139), and that right the association cannot take away or defeat. It contemplates a transfer on the books of the association, and all that the association is authorized to do is to prescribe the manner in which the transfer shall be made on its books. There is here no limitation whatever upon the right of transfer, and none exists except such as is implied from the nature of the transaction or from other provisions of the act. Another section (Rev. Stats. sec. 5201) prohibits the bank from dealing in its own shares. This implies a restriction on the shareholder in selling his shares to the bank itself, or to a known trustee for the bank. And a shareholder cannot transfer his shares colorably, and thereby cease to be a shareholder as respects creditors and other shareholders who would be injured by the transfer. There may also be an implied prohibition against the right to transfer shares to an infant or person not capable in law of assuming the liabilities, as well as

enjoying the rights, of the transferrer of the shares in respect thereto, but we have no occasion to determine this point. (Rev. Stats. sec. 5139; compare *Ib.* sec. 5152, *Weston's Case*, Law Rep. 5 Ch. 614, 620.) And, on general principles, there may also be an implied prohibition against the transfer of shares to a pauper or man of straw or insolvent person, for the fraudulent purpose of escaping liability — but this is a matter that need not now be considered.

Subject, however, to such prohibitions and limitations, the right of the share-owner to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same and of assuming the liabilities of the transferrer in respect thereto, is plainly deducible from the national banking act itself. But if any doubt could exist on this subject, it would be removed by the judicial decisions construing the provisions of the banking act in this regard and similar provisions in other legislative enactments.

In *The Bank* v. *Lanier*, 11 Wall. 369, arising under the national banking act, it was expressly held by the supreme court of the United States that the owner of shares in a national bank may transfer the same by an assignment and delivery of the certificates, and the transferee may compel the bank to register the transfer on its books. The learned justice who delivered the opinion of the court in that case, after speaking of the additional value given to this species of property by reason of its transferable quality, says: "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred," even if the transferrer is the debtor of the bank. The duty of the bank to make the transfer in such a case is held to be a corporate duty, in respect of which the bank is liable for the wrongful acts and omissions of its officers.

It was urged in the argument at the bar in the present case that the provision that the shares should "be transferable on the books of the bank" gave the directors of the bank the power to approve or disapprove of any given transfer of shares, and

to register or refuse to register the same, as in their judgment the interests of the bank or of the other stockholders might require. Such, however, is not the object of this very common provision in charters and acts of incorporation. The purpose of requiring a transfer on the books of the bank is that the bank may know who are the shareholders, and as such entitled to vote, receive dividends, etc., and for the protection of *bona fide* purchasers of the shares, and of creditors and persons dealing with the bank. That such is the meaning of the provision in question, and that it does not restrict the right of the owner to transfer his stock or clothe the corporation with the power to refuse to register *bona fide* transfers, is settled beyond all question by numerous decisions in the English and the federal and state courts. (*Black* v. *Zacharie*, 3 How. 483; *Union Bank* v. *Laird*, 2 Wheat. 390; *Webster* v. *Upton*, 1 Otto, 65, 71; *Bank* v. *Lanier*, 11 Wall. 369; *St. Louis, etc. Insurance Co.* v. *Goodfellow*, 9 Mo. 149; *Chouteau Spring Co.* v. *Harris*, 20 Mo. 382; *Moore* v. *Bank*, 52 Mo. 377; *Hill* v. *Pine River Bank*, 45 N. H. 300; *Re London, etc. Telegraph Co.* Law Rep. 9 Eq. 653.)

The general subject of the right to transfer shares has been much discussed in the cases in England arising under the various companies acts. Some of these acts give the directors express power to refuse to assent to or register transfers of shares, and some do not. The result of the English cases is that the directors cannot refuse to register a *bona fide* transfer of stock unless the power to do so is expressly given in the act of parliament or the articles of association. The leading authority on this point is *Weston's Case*, Law Rep. 4 Ch. 20. See, also, *Gilbert's Case*, *Ib.* 5 Ch. 559. In *Weston's Case*, Law Rep. 4 Ch. 20, Lord Justice PAGE WOOD, in considering this subject, said:

"I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnerships from which members can retire at once, and free themselves from responsibility

at any time they please, by going into the market and disposing of and transferring their shares, without the consent of directors or shareholders, or anybody, provided only it is a *bona fide* transaction; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles, by which the directors have powers of rejection of members. *Shortridge* v. *Bosanquet*, 16 Beav. 84, which went to the house of lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the companies act of 1862, in the 22d section, gives a power of transferring shares. I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of association. * * * It would be a very serious thing for the shareholders in one of these companies to be told that their shares, the whole value of which consists in their being marketable and passing freely from hand to hand, are to be subject to a clause of restriction which they do not find in the articles. And, I may add, that if we were to hold that such powers were vested in the directors, it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause."

In *Gilbert's Case*, Law Rep. 5 Ch. 559, 565, Lord Justice GIFFARD said: "I agree that, according to *Weston's Case*, and according to what I have always considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles of association, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them."

And although there is express power to the directors to refuse to assent to or register a transfer, this power must be exercised in a reasonable manner and *bona fide*, and they must have some valid and lawful reason for refusing to register. (*Ex parte Penny*, Law Rep. 8 Ch. 446; *Nation's Case*, *Ib.* 3 Eq. 77; *Fyfe's Case*,

Ib. 9 Eq. 589; *Allen's Case, Ib.* 16 Eq. 449; *Ib.* 559; *Weston's Case, Ib.* 5 Ch. 614, 620; *Ex parte Elliott, Ib.* 2 Ch. 104.) In a case where the directors had power to approve or reject the transfer of shares, one of the vice-chancellors, speaking of the right of a share-owner to dispose of his shares, said: "One of the incidents [of this class of property] is the right to transfer it — a right to make a present and complete transfer of it. It is the duty of the directors to receive and register the transfer, or to furnish some [valid and sufficient] reason for refusing to transfer." (*Re Stranton, etc. Co.* Law Rep. 16 Eq. 559, per BACON, vice-chancellor.) Similar observations are made by the supreme court of the United States in *The Bank* v. *Lanier, supra.* Mr. Justice DAVIS there said: "The power to transfer their stock is one of the most valuable franchises conferred by congress. * * It enhances the value of the stock. Although neither in form nor character negotiable paper, they [the share certificates] approximate to it as nearly as possible."

It would be a new, and, I apprehend, a startling, doctrine to proclaim that the holder of shares in a corporation, where the only provision on the subject of transfers was one requiring them to be made on its books, had no right to make a complete and effectual disposition of them without the consent of the directors or other shareholders. No such power over the right of transfer has been given in the national banking act. Such a power is so capable of abuse, and so foreign to all received notions and the universal practice and mode of dealing in these stocks, that it cannot, in the absence of legislative expression, be held to exist.

For these reasons, and upon these authorities, the proposition must be considered as established that a share-owner in a national bank, while it is a going concern, has the absolute right, in the absence of fraud, to make a *bona fide* and actual sale and transfer of his shares at any time to any person capable in law of purchasing and holding the same and of assuming the transferrer's liabilities in respect thereto, and that this right is not, in such cases, subject to the control of the directors or other stockholders.

Our second proposition is that Laflin did make a complete and effectual sale and transfer of his shares to James H. Britton individually, and that, as to Laflin, it was not a sale and transfer of the stock to the bank. Laflin sold through the broker or agent, Keleher, and the latter dealt with Britton as an individual, without knowledge that Britton intended to turn over the shares to the bank, and he received in payment for the shares the personal check of Mr. Britton, and delivered to him at the same time the certificates of stock assigned in blank, with powers of attorney in blank thereon endorsed, authorizing the transfer of the shares on the books of the bank.

As between Laflin and Britton, the transfer was complete by the sale, assignment, delivery, and payment, without registration, and this, whether it gave Britton before the registration the legal title to the shares as against Laflin, or only a complete equitable title. (*Union Bank* v. *Laird*, 2 Wheat. 390; *Webster* v. *Upton*, 1 Otto, 65, 71; *Black* v. *Zacharie*, 3 How. 483; *Bank* v. *Lanier*, 11 Wall. 369, 377; *Chouteau Spring Co.* v. *Harris*, 20 Mo. 382; *Moore* v. *Bank*, 52 Mo. 377; *New York, etc. Railroad Co.* v. *Schuyler*, 34 N. Y. 80; *McNeill* v. *Bank*, 46 *Ib.* 325; *Grimes* v. *Howe*, 49 *Ib.* 17, 22; *Bank of Utica* v. *Smalley*, 2 Cow. 778; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Ross* v. *Southwestern Railroad Co.* 53 Ga. 514; *Hoppin* v. *Buffum*, 9 R. I. 513; *Bank of America* v. *McNeil*, 10 Bush. [Ky.] 54; *Davis* v. *Lee*, 26 Miss. 505; *German Union Assn.* v. *Sendemeyer*, 50 Pa. St. 67; *Leavitt* v. *Fisher*, 4 Duer, 1.)

That the transaction is complete as between seller and purchaser of stock by the assignment and delivery of the certificate assigned, with the power to transfer and the receipt of payment, is fully shown by these cases, and is also evident from the fact that thereupon the each of them has the legal right to have a transfer of the shares made on the books of the bank. The seller of the shares, for his protection against creditors of the bank in case of insolvency, may transfer the same on the books to the vendee, the purchase being the authority to the seller to do this. (*Webster* v. *Upton*, 1 Otto, 65, 71.) And, for the like

reason, the seller of shares who has done all that is necessary to enable the purchaser to transfer the shares on the books, may file a bill to compel the vendee to record the transfer. (*Shaw* v. *Fisher*, 2 DeG. & S. 11; *Cheale* v. *Kenward*, 3 DeG. & J. 27; *Wynne* v. *Price*, 3 DeG. & S. 310; *Webster* v. *Upton*, 1 Otto, 65, 71.) So, also, the vendee of the shares, where the vendor has done all that is necessary to enable the transfer to be registered, may for his own protection compel the bank to register the transfer, or hold it liable in damages for a wrongful refusal. (*Bank* v. *Lanier*, 11 Wall. 369; *Hill* v. *Pine River Bank*, 45 N. H. 300; *Bank of Utica* v. *Smalley*, 2 Cow. 778; *Commercial Bank* v. *Kortright*, 22 Wend. 348.)

The delivery of the share certificates assigned in blank and blank transfers will entitle the *bona fide* vendee to have the transfer registered. "Whoever in good faith buys the stock and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred" (*Bank* v. *Lanier*, 11 Wall. 369, per DAVIS, J.), unless there exists some valid and legal reason in favor of the bank for refusing to register the transfer, as in the case of the *Union Bank* v. *Laird*, 2 Wheat. 390. In that case the charter gave the bank a lien for the shareholder's debt to it, and provided that "stock shall be transferable only on the books of the bank." Under these circumstances the bank was held to have a lien on the shares to secure the share-owner's indebtedness to it, which was superior to the right of the unregistered transferee of the stock. (*Black* v. *Zacharie*, 3 How. 483.)

If the foregoing propositions are sound, Britton, as against Laflin, had the right immediately on delivery and payment to register the transfer of the shares, and had the power to fill up the blank transfers and have the transfer registered. (*Re Tahite Cotton Co.* Law Rep. 17 Eq. 273; *German Union Assn.* v. *Sendemeyer*, 50 Pa. St. 67; *Leavitt* v. *Fisher*, 4 Duer, 1; *Commercial Bank* v. *Kortright*, 22 Wend. 348.) Nothing more was required to be done by Laflin or needed to enable Britton to make his title complete. And Laflin could have compelled Britton to

register the transfer. If Laflin had proceeded against Britton, he could have forced him to have accepted a transfer of the stock in his own name or in the name of some person capable of taking and holding the same. (*Maxted* v. *Payne*, Law Rep. 6 Ex. 132.) It would have been no answer to Laflin for Britton to have said, "I bought this stock, not for myself, but for the bank." Laflin could have rejoined, "You purported to act for yourself; I supposed you were so acting, and you had no authority, and could have had none, to act for the bank."

It is held in England, under the companies act, that the transferrer of shares is liable to be treated as a stockholder until he transfers to one who is in law capable of holding and liable in respect of the shares, and whose purchase is registered, unless, perhaps, where the neglect to register is entirely the fault of the corporation or its officers. (*Fyfe's Case*, Law Rep. 4 Ch. 768; *Lowe's Case*, *Ib.* 9 Eq. 589; *Shropshire, etc. Railway and Canal Co.* v. *The Queen*, *Ib.* 7 H. L. 496, 513; *McEwen* v. *West London Wharves, etc. Co. Ib.* 6 Ch. 655; *Weston's Case*, *Ib.* 5 Ch. 614, 620; *Gooch's Case*, *Ib.* 8 Ch. 266; *Gilbert's Case*, *Ib.* 5 Ch. 559; *Master's Case*, *Ib.* 7 Ch. 292; *Nickalls* v. *Merry*, *Ib.* 7 H. L. 530; *Symonds' Case*, *Ib.* 5 Ch. 298; *Heritage's Case*, *Ib.* 9 Eq. 5.)

Assuming, without deciding, that this principle applies in all its force under the national banking act, if Laflin had sold to an infant, his liability would remain, notwithstanding the transfer was registered. (*Nickalls* v. *Merry*, Law Rep. 7 H. L. 530; *Symonds' Case*, *Ib.* 5 Ch. 298.) If he had sold to the bank, he would remain *prima facie*, if not actually, liable, if the bank should so elect. And if the seller of shares remains liable under the national banking act until there is a registered valid transfer — that is, until some person succeeds to the stock who is capable of holding it and liable in respect to it — this principle will not make Laflin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his own name, as it was his duty towards Laflin to do, registered it in his name as "trus-

tee," without Laflin's knowledge. But the act (Rev. Stats. sec. 5152) authorizes the holding of stock by a trustee. If Laflin, in order to relieve himself of liability, is bound to see the transfer of the stock registered, the registry actually made would not charge him with constructive notice that the bank was in reality the *cestui que trust.*

Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no *cestui que trust* who is liable. He is liable for the unauthorized investment and use of the trust moneys of the bank, and can be compelled to refund it. (*Great Eastern Railway Co.* v. *Turner*, Law Rep. 8 Ch. 149.) If it becomes necessary to assess the stockholders, he will be estopped to say that he is not individually responsible, since he was not acting by authority of any *cestui que trust* capable of taking and holding the shares. If the sale of this stock had been registered to Britton individually, it is clear that Laflin would not have been liable to the bank or its creditors; and, as the matter now stands, the bank and its creditors have every right and remedy against Britton which they would have had if the shares had been transferred to him individually instead of to him as "trustee."

Our third proposition is that Laflin is not liable because the money received for the stock was unlawfully taken by Britton from the bank. The reason for this conclusion is that Laflin parted with value — with his shares, with his power of control over them, and the right to sell them to others — and had no notice at or prior to the consummation of the transaction that Britton was acting *ultra vires*, and intended to misappropriate the funds of the bank. If he had dealt directly with the bank, or if he or his agent had known what took place inside the counter before the transaction with Britton had been completed, he would have been liable.

It is urged by the receiver's counsel that Laflin had constructive notice. Mr. Shields, in his argument, bases Laflin's liability on the proposition that, being a shareholder in the bank, he is charged with constructive notice of the condition of the

bank, and of what was done by the president in violation of law and of his official duty in respect of these shares. I admit that if, in a transaction directly with the bank, he had received moneys to which he was not entitled, he could be made to pay back the same, irrespective of the question of knowledge on his part. (*Curran* v. *Arkansas*, 15 How. 304; *Railroad Co.* v. *Howard*, 7 Wall. 392.) But it is to be remembered in this case that Laflin is sought to be made liable in respect of the sale and transfer of his shares, which sale and transfer he had the perfect right to make, if he acted *bona fide;* and he has the same right to sell his shares to another shareholder that he would have to sell them to a person not a shareholder. Even directors have the right to make a *bona fide* sale of their shares, and thus get rid of liability, if they pursue the articles or charter, and take no advantage of their position and commit no fraud. (*Gilbert's Case*, Law Rep. 5 Ch. 559; *Ex parte Littledale*, *Ib.* 9 Ch. 257.) And shareholders, in the exercise of their right to transfer shares, are not bound, it seems, to take notice of irregularities on the part of the directors in respect to the transfer of shares. (*Bargate* v. *Shortridge*, Law Rep. 5 H. L. 297, 323; *Taylor* v. *Hughes*, 2 Jo. & Lat. 24; *Ex parte Bagge* v. *North Coal Co.* 13 Beav. 162.) Nor are directors, it seems, much less shareholders, in the transfer of their stock, bound to take notice of the books of account of the company. (*Cartmell's Case*, Law Rep. 9 Ch. 691; *Hill* v. *Manchester, etc. Co.* 2 Nev. & M. 573; 5 Barn. & Ad. 874; *Haynes* v. *Brown*, 36 N. H. 568.)

We are of opinion, therefore, that the sale and transfer of the stock, as between Laflin and Britton, was complete as soon as the stock was delivered, assigned in blank, with the power to transfer, and payment received; and that what Britton, without Laflin's knowledge, afterwards did, although on the same day, in transferring the shares to himself as trustee for the bank, and in reimbursing himself out of the funds of the bank, could not retroact upon Laflin, whose status had already been fixed, and whose rights had already been acquired. (*Bank of America* v. *McNeil*, 10 Bush, 54, 58.)

Mr. Henderson's argument for the receiver went mainly upon the ground that Laflin was chargeable, through Mr. Girault, with constructive notice of Britton's wrongful acts in the purchase of these shares, and in the use of the bank's money to reimburse himself therefor.

This argument rests upon these propositions: That the sale was not complete until the transfer was registered; that, in making the transfer, Girault, although acting under Britton's directions, was solely Laflin's agent (by virtue of his inserting his name in the blank power of attorney); and that, inasmuch as Girault knew of Britton's acts in directing the transfer for the benefit of the bank, and in paying himself for the purchase money out of the general means of the bank, the law imputes this knowledge to Mr. Laflin. The first branch of this proposition is inconsistent with the one which we have above attempted to maintain, viz., that the transaction between Laflin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank, unless the bank had some valid reason for refusing to register the transfer. Britton had the right to register the purchase in his own name. He was in good credit with the bank, and in the community. He was not then known to be insolvent—indeed, it is not shown by the proofs that he is now insolvent. Laflin could have compelled him to register the transfer in his own name. In the eye of the law, the transfer to Britton as "trustee" is a transfer to Britton individually; for, as above shown, Britton could not set up his *ultra vires* acts to defeat his personal responsibility. (*Ashhurst* v. *Mason*, Law Rep. 20 Eq. 225; *Ex parte Littledale*, *Ib.* 9 Ch. 257.) If Laflin had a completed right, immediately on receiving payment for the shares, to have Britton register the transfer of the shares, and if, immediately on such payment, Britton had the right to register the transfer to himself, and if the bank could not have resisted Laflin's application to compel a registration of the transfer to Britton, it is obvious that notice subsequently received by Laflin personally, or through an agent, would be immaterial.

If this view is sound, it is unnecessary to decide the further question, whether Girault, in consequence of his relations to Britton, and the fact that he acted as his servant, and implicitly obeyed his directions, is to be regarded, in making the formal act of transfer on the books, as the agent of Laflin, in such sense that knowledge acquired by him from Britton is to be imputed to Laflin. It deserves consideration, whether, under the circumstances, Girault was Laflin's agent, so as constructively to affect Laflin with notice of what was being done, not in the necessary or lawful execution of his authority, but in violation of that authority, and in hostility to his rights, as well as those of the bank. These are the positions taken by Mr. Slayback in Mr. Laflin's behalf, and they certainly have great force. For, in this view, if the name of some one outside the bank, having no knowledge of what was going on inside the bank, had been filled in by Britton as the attorney to make the transfer, or if Britton had filled in his own name, Laflin would not be liable. It is certainly extremely narrow ground to make Laflin's liability depend upon the accident whose name shall be used to make the formal transfer, and upon what knowledge of the interior working of the bank such person may happen to possess, especially in view of the custom to transfer stock in blank through many hands before any registry is made.

It was strongly urged at the bar by Mr. Henderson, for the receiver, that the foregoing views of the right of the shareholder to transfer his shares will have the effect to permit transfer to persons not able to respond to the double liability imposed on shareholders, and thus work an injury to the solvent shareholders and to creditors. But we must hold to the absolute right of the share-owner to transfer his stock in good faith, or the alternative that the directors may have the right to refuse their assent to such transfer, thus putting a shareholder in their power. Not a syllable can be found in the banking act giving the directors such a power; while, on the other hand, the right to transfer shares is expressly recognized. If it is desirable for the security of the shareholders or creditors that the existing

members should, through the directors, have a veto on the right of a shareholder to transfer his shares, such a power must be plainly conferred. It has not been given, and cannot, therefore, be held to exist.

It is proper to remark, in order to preclude erroneous inferences from the views here maintained, that it is probable that the unrestricted right of transfer has reference to transfers in solvent and going concerns, and is not intended to enable shareholders to escape from liability where the association has committed an act of insolvency, or has ceased to be a going concern. (*Allin's Case*, Law Rep. 16 Eq. 449, per Lord Chancellor SELBOURNE; *Chappell's Case*, *Ib.* 6 Ch. 902.) While we maintain the right of a shareholder to dispose of his shares absolutely, by an out-and-out sale and registered transfer, and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferrer, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferrer knows will make the transfer, if it is sustained, work a fraud upon the other shareholders, or upon the creditors of the bank.

The result is, that there must be a decree dismissing the bill as to Laflin, and as the bill is not framed for separate relief against Britton, dismissing the same as to him also, but without prejudice.

BILL DISMISSED.

NOTE.—How far receiver of an insolvent corporation represents both creditors and stockholders: *Gillet* v. *Moody*, 3 Comst. 479, 488; *Talmage* v. *Pell*, 7 N. Y. 328; *Ex parte Ginger*, 5 Irish Ch. 174.

The *assets of an insolvent corporation* are a fund for the payment of its debts. If they are held by the corporation itself, and so invested as to be subject to legal process, they may be levied on by such process. If they have been distributed among stockholders, or gone into the hands of others than *bona fide creditors or purchasers, leaving debts of the corporation unpaid, such holders take the property charged with the trust* in favor of creditors which a court of equity will enforce, and compel the applica-

tion of the property to the satisfaction of their debts. This has been often decided, and rests upon plain principles. (*Curran* v. *Arkansas*, 15 How. 304; *Wood* v. *Dummer*, 3 Mas. 308; *Hightower* v. *Dozier et al.* 8 Ga. 487; *New Albany* v. *Burke*, 11 Wall. 96; *Burke* v. *Smith*, 16 Wall. 390; *Sawyer* v. *Hoag*, 17 Wall. 610; *Upton* v. *Trebilcock*, 1 Otto, 45; *Sanger* v. *Upton*, *Ib.* 56; *Morton* v. *Zellerbach*, 38 Cal. 301; *Railroad Co.* v. *Howard*, 7 Wall. 392.) Mr. Justice STORY says: "On the principle that the capital stock was a trust fund, it is clear that it might be followed by the creditors into the hands of any person having notice of the trust attached to it; *that as to the stockholders themselves there can be no pretence to say that both in law and in fact they were not affected by the most ample notice.*" (*Wood* v. *Dummer*, *supra.*)

"*A purchase by a company of their own shares* is not a legal transaction [it is *ultra vires*], unless there is a clear, distinct, undoubted, and special authority [in the articles of association] authorizing them to do so." (GIFFARD, lord justice, in *Re London, etc. Exchange Bank*, Law Rep. 5 Ch. 444, 452, 1870; *Ib.* 707; *Great Eastern Railway Co.* v. *Turner*, *Ib.* 8 Ch. 149; *Hope* v. *International, etc. Society*, *Ib.* 4 Ch. 327.) See, also, *Currier* v. *Lebanon Slate Co.* 56 N. H. 262, where it is said by the court: "The funds of an insolvent corporation cannot be taken to buy in a portion of its capital stock, at the expense of its remaining stockholders. It would be grossly inequitable to the other stockholders, and a fraud upon the creditors. * * * But, assuming that this corporation, on March 17th, 1869 [the date when the stockholders voted to release a stockholder from his subscription] was solvent, it becomes material to inquire whether the corporation could lawfully purchase of Liscomb one hundred shares of its capital stock, the assessments upon which he had been unable to meet. In *Salem Mill Dam Corporation* v. *Ropes*, 6 Pick. 23, it is laid down that 'no vote or act of a corporation can enlarge its chartered authority, either as to the subject on which it is intended to operate, or the persons or property of the corporators. If created with a fund limited by the act, it cannot enlarge or diminish that fund but by license from the legislature; and, if the capital stock is parcelled out into a fixed number of shares, this number cannot be changed by the corporation itself.'" Compare with the foregoing, the following: *Ex parte Holmes*, 5 Cow. 426, 434; *Taylor* v. *Miami Express Co.* 6 Ohio, 218; *Robinson* v. *Beall*, 26 Ga. 17; *Hartridge* v. *Rockwell*, R. M. Charlt. 260; *Cooper* v. *Frederick*, 9 Ala. 738; *Williams* v. *Savage Mfg. Co.* 3 Md. Ch. 418, 452; *State Bank of Ohio* v. *Fox*, 3 Blatchf. 432; *Bank of Columbus* v. *Bruce*, 17 N. Y. 507; Angell & Ames on Corporations, sec. 159; Schouler on Personal Property (1st ed.), p. 622; Green's Brice's Ultra Vires, p. 99, note.

If the officers of a corporation illegally and *ultra vires* invest its money in stock in the name of a trustee, this is an unauthorized invest-

ment of trust moneys, but the *cestui que trust* may have the benefit of the purchase if he elects, or may repudiate it. (*Great Eastern Railway Co.* v. *Turner*, Law Rep. 8 Ch. 149; *Ashhurst* v. *Mason*, *Ib.* 20 Eq. 225.)

Sale and transfer of shares by a "trustee" or executor: *Duncan* v. *Jaudon*, 15 Wall. 165; *Brewster* v. *Sime*, 42 Cal. 139; *Bayard* v. *Farmers, etc. Bank*, 52 Pa. St. 232; *Albert* v. *Mayor, etc.* 2 Md. 159; *Shaw* v. *Spencer*, 100 Mass. 382; *Sturtevant* v. *Jacques*, 14 Allen, 525.

The provisions in the companies acts as to *transfer of stock*, have reference to the transfer in solvent and "going concerns," and are not intended to enable shareholders to escape from liability when the company has ceased to be a going concern. (*Allin's Case*, Law Rep. 16 Eq. 449, per Lord Chancellor SELBOURNE; *Chappell's Case*, *Ib.* 6 Ch. 902.)

A *bona fide* out-and-out registered transfer — no trust for transferrer existing — relieves transferrer, if no fraud is committed and the articles are pursued. (*Master's Case*, Law Rep. 7 Ch. 292; *Gilbert's Case*, *Ib.* 5 Ch. 559; *Weston's Case*, *Ib.* 4 Ch. 20.) Must be a complete and valid transfer and registration of transfer, where required by charter or articles of association, to vest the shares in the transferee so as to release the transferrer: *McEwen* v. *West London Wharves, etc. Co.* Law Rep. 6 Ch. 655. When the sale is complete and the transfer is left with the office of the company for registration, but never registered through the laches of the company's officers, the transferrer is not liable. (*Fyfe's Case*, Law Rep. 4 Ch. 768; *Lowe's Case*, *Ib.* 9 Eq. 589.) Duty to register valid transfer: *Gilbert's Case*, *supra*; *Weston's Case*, *supra*; *Bank* v. *Lanier*, 11 Wall. 369.

A *director* may transfer his shares. If he transfers when a call is due, contrary to statute, and the transfer is registered, it is not invalid — the transferee becomes the shareholder, and the director is liable to the company for any loss occasioned by the transfer. (*Ex parte Littledale*, Law Rep. 9 Ch. 257.)

Where the charter provides that "stock shall be transferable only on the books of the bank," an assignment and delivery of shares vests an equitable title only until the stock is transferred on the books of the bank, and an equitable assignment is subject to the rights of the bank under its charter; and where the charter gives the bank a lien for the debt of the owner of the shares, the right of the bank is superior to the rights of the unregistered transferee of the stock. (*Union Bank* v. *Laird*, 2 Wheat. 390; *Webster* v. *Upton*, 1 Otto, 65, 71; S. P. *Black* v. *Zacharie*, 3 How. 483, where the question arose between equitable assignee and attaching creditor of the seller.) The provision requiring transfers on the books of the bank is for the benefit of the bank and *bona fide* purchasers. An assignment without transfer on books of bank is good between the parties and attaching creditors of the vendor with notice. (*Black* v. *Zacharie*, 3 How. 483, 513; *Bank of Commerce's Appeal*, 73 Pa. St.

59; *State* v. *Gas-Light Co.* 25 La. An. 413; *Ross* v. *Southwestern Railroad Co.* 53 Ga. 514; *Brown* v. *Kneeland*, 5 Biss. 181; *Smith* v. *American Coal Co.* 7 Lans. 317; *Grymes* v. *Hone*, 49 N. Y. 17; *Bank of America* v. *McNeil*, 10 Bush, 54; *Fisher* v. *Essex Bank*, 5 Gray, 373; *Boyd* v. *Rockport Cotton Mills*, 7 *Ib.* 406; *Williams* v. *Market Bank*, 5 Blatchf. 59; *Green Mountain Co.* v. *Butler*, 45 Ind. 1; *Moore* v. *Bank*, 52 Mo. 377; Angell & Ames on Corporations [10th ed.], secs. 534, 535.)

In *Bank* v. *Lanier* (11 Wall. 369), it was held that the owner of shares in a national bank may transfer the same by a delivery of the certificates, and the transferee may compel the bank to transfer and enter the shares on the books. The duty of the bank to make transfer is a corporate duty, and it is liable if it refuses to perform it. Where the certificates provided that the shares were transferable on the books of the bank, in person or by attorney, *only on surrender of the certificates*, if the bank transfers the stock without the surrender of the certificates, it is liable to a subsequent purchaser of the stock who obtained and held the certificates, and who bought without notice of the previous sale, and who, if he had examined the books of the bank, would have seen that his vendor had previously sold and transferred the stock on the books of the bank. "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred" — even if the transferrer is the debtor of the bank. (*Ib.*)

Transferee must be liable. — Mr. Heritage owned one hundred shares of stock in the Merchants' Company, which he directed his broker to sell, and the shares were sold in the ordinary way to a firm of stock jobbers on the stock exchange (as to whose liability see *Maxted* v. *Payne*, Law Rep. 6 Ex. 132). The jobbers reported one Hankey as the purchaser. Heritage executed a transfer of the shares to Hankey, and the company registered the transfer. On the ground that *Hankey had not accepted* the shares, the court removed his name from the register of shareholders, and subsequently held that Heritage was liable as a stockholder. Lord Romilly, master of the rolls, said: "If shares are once taken properly and *bona fide* by a person, those shares remain the shares of the person who took them from the company, and cannot be altered, except by a declared forfeiture, or by some valid transfer from the person who took them to some other person. * * * It is no doubt a very hard matter for a man not to have got rid of his shares when he has taken every step that depended on him for the purpose; but it necessarily follows that if he has not duly transferred the shares, they remain in him. * * * The court has determined that no valid transfer was made from Mr. Heritage, and, therefore, Mr. Heritage remains the shareholder. His name is, therefore, properly on the list of contributories, and I cannot remove it. * * * But I am asked to strike off the name of Mr.

Heritage, the result of which would be simply to cancel the shares. I do not find any case in which anything of the kind has ever been done, and I am at a loss to understand on what principle it could be done." (*Re Merchants' Company, Heritage's Case*, Law Rep. 9 Eq. 5, 1869; s. P. *Symonds' Case, Ib.* 5 Ch. 298, 300.)

Mode of transfer.—Mere delivery, without assignment of certificates of stock, by one in whose name the stock stands, though for value, will not give a *legal* title. Title can only be obtained by a transfer of the shares into the name of the transferee; "and, perhaps, also," says Lord HATHERLEY, "but I think that has not been quite decided, it may be necessary that he should obtain a registry" on the books of the corporation. (*Shropshire, etc. Railway and Canal Co.* v. *The Queen*, Law Rep. 7 H. L. 496, 513.) But delivery of stock certificates with blank transfers will entitle *bona fide* vendee to have the transfer registered. (*Re Tahite Cotton Co. ex parte Sargent*, Law Rep. 17 Eq. 273; *German Union Asm.* v. *Sendemeyer*, 50 Pa. St. 67; *Leavitt* v. *Fisher*, 4 Duer, 1.) The directors cannot refuse to register a *bona fide* transfer of stock unless power to do so is given them in the articles of association. (*Weston's Case*, Law Rep. 4 Ch. 20.) Although there is a provision requiring directors' assent to a transfer of the shares, this discretion must be exercised in a reasonable manner, and they must have some valid reason for refusing to register a transfer. (*Nation's Case*, Law Rep. 3 Eq. 77; *Fyfe's Case, Ib.* 4 Ch. 768, 769, note; *Lowe's Case, Ib.* 9 Eq. 589; *Allin's Case, Ib.* 16 Eq. 449; *Ex parte Penny, Ib.* 8 Ch. 446.) And even where the directors have express authority to refuse to register a transfer, if the transfer is colorable and the transferrer procures the registration of the transfer by deceiving the directors, he may, notwithstanding the sale and registry, be treated as the owner of the shares when the corporation is wound up. (*Re Imperial, etc. Asm.* Law Rep. 9 Eq. 223; *Kintrea's Case, Ib.* 5 Ch. 95.)

An *infant* cannot become purchaser and transferee of shares so as to relieve transferrer of liability as a shareholder (*Nickalls* v. *Merry*, Law Rep. 7 H. L. 530), even although the transfer to the infant be registered (*Symonds' Case*, Law Rep. 5 Ch. 298; *Weston's Case, Ib.* 614); but if the infant does not repudiate the transfer on coming of age, he may become liable though holding as truetee for another (*Mitchell's Case*, Law Rep. 9 Eq. 363). "The original shareholder remains a shareholder, even in cases where he is entirely innocent of the transaction, and not aware that the shares were being transferred to an infant." (Lord Chancellor HATHERLEY, *Weston's Case*, Law Rep. 5 Ch. 614, 620.) But a subsequent registered transfer by the infant to an adult may relieve the original seller. (*Gooch's Case*, Law Rep. 8 Ch. 266.) A director who took stock in the name of his infant children held liable as a contributory: *Ex parte Wilson*, Law Rep. 8 Ch. 45. Transfer of shares to a pauper, or man of straw: *Re Imperial, etc. Asm.* Law Rep. 9 Eq. 223;

Maxted v. *Payne*, *Ib.* 6 Ex. 132. Liability under English companies act of 1862, section 38, of *past* members to contribute on the winding up of the company: *Helber* v. *Bawner*, Law Rep. 5 H. L. 28.

See reference to principal case and criticism upon it in Thompson on Liability of Stockholders — a valuable essay on the subject treated — published since the foregoing was written.

Re STICKNEY.

1. The word "tradesman," in section 5110 of the Revised Statutes of the United States, has a very limited signification. The expression is imported from the English bankruptcy act, and means a small merchant or shopkeeper.
2. Where a firm which became bankrupt had been, as large stockholders, connected with, and were the principal officers of, a manufacturing corporation not in bankruptcy: *Held*, that such connection did not of itself constitute the bankrupts merchants or tradesmen; and that, although outside of the business of the corporation they borrowed largely and owned a farm, and carried on business in connection therewith, but did not carry on any business of merchandising, or hold themselves out to the community as merchants, they were not "merchants or tradesmen" within the meaning of the law, and their failure to keep "proper books of account" was not ground for refusing a discharge in bankruptcy.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act. — Meaning of "Tradesman." — Discharge.

THIS was an appeal from the district court of the United States for the eastern district of Missouri, brought to this court on a petition for review filed by the bankrupt. Seven specifications were filed in the district court against the discharge of the bankrupt, all of which, with the exception of the fifth, were overruled by the district court. The fifth specification was based on the seventh sub-division of section 5110 of the United States Revised Statutes, which provides that no discharge shall be granted, or, if granted, shall be valid, "if the bankrupt, being a merchant or tradesman, has not, at all times after the 2d

day of March, 1867, kept proper books of account." The district court held that the bankrupt was a merchant or tradesman within the meaning of the bankrupt act, and that he had failed to keep proper books of account, as prescribed by said act, and, accordingly, refused to grant a discharge to the bankrupt. The bankrupt was a partner of one E. T. Merrick, under the firm name of Merrick & Stickney, both of whom were adjudged bankrupts. The discharge of both bankrupts was refused, on the ground above stated, and Mr. Merrick having meanwhile died, Mr. Stickney appealed to this court.

Merrick & Stickney were adjudged bankrupts on a creditors' petition filed in November, 1873. The character of their business was disclosed by the testimony of Mr. Merrick on the hearing of the opposition to the discharge. That testimony was, so far as material to the point decided, as follows, to-wit:

"Mr. Stickney and myself came to St. Louis in the year 1858 and formed a law copartnership, and practiced law for about a year. We then quit the law business and directed our attention to the buying of and dealing in land warrants. We were partners from the time we came to St. Louis until our bankruptcy, in 1873. Our business since 1866 has been exclusively that of farmers and manufacturers. From 1859 to the end of 1866 we dealt largely in land warrants and government vouchers. We had many friends in the east who loaned us money with which to carry on this business. These friends could get only six or seven per cent interest on their money in the east, and we allowed them ten per cent on the moneys they advanced. We entered a large amount of Kansas lands ourselves, and gave mortgages thereon to those who had advanced us money. We had a large tract of land in St. Charles county, Missouri, on the drainage of which we spent large amounts of money — between $20,000 and $30,000 — which, at one time, made these lands of great value; but, owing to a blunder of engineering, these lands were flooded and became enormously depreciated in value. This loss and the financial panic of 1873 brought us to bankruptcy. These lands were farmed by myself and my partner,

Mr. Stickney. We also owned land in Cahokia, Illinois, which we also farmed ourselves. Since 1866 Merrick & Stickney have not traded in land warrants, nor have we since then bought any lands—at least, we have not made a business of buying lands, but have since sold some of the lands we then owned. We have since then received loans, for which we gave mortgages on the lands owned by us, or secured such loans by pledges on our stock in the stoneware company; and we also received loans on our personal credit. Our business as manufacturers has been exclusively connected with the St. Louis Stoneware Company, a corporation organized under the laws of Missouri. Both Mr. Stickney and myself were officers of the corporation, and he and I were the principal stockholders. We have, since the organization of this company, in 1865, devoted the greater part of our time to the business of that company. That company kept separate books of account, entirely unconnected with the business of Merrick & Stickney. The company employed a regular bookkeeper, and its books have been regularly kept. Said company has not gone into bankruptcy, but still carries on business. The books of Merrick & Stickney, taken altogether, show all the moneys received and paid out, to the best of my belief. There may have, of course, been omissions, but if so, those omissions were entirely through inadvertence."

For the bankrupt it was contended (1) that neither he nor his firm were merchants or tradesmen within the meaning of the bankrupt law; and (2) that the books of account were properly kept. His counsel urged that a trader is one who makes it his business to buy merchandise, or goods and chattels, and to sell the same for the purpose of making a profit, and cited the following authorities on the first point: 2 Bouvier's Law Dictionary, 604; *Heane* v. *Rogers*, 4 Man. & R. 486; *Sutton* v. *Wheeley*, 7 East, 441; *Re Cote*, 14 Nat. Bankr. Reg. 503; *Re Rugsdale*, 16 *Ib.* 215. And on the second point bankrupt's counsel cited the following authorities: *Re Solomon*, 2 Nat. Bankr. Reg. 285; *Re Newman*, 2 *Ib.* 302; *Re White*, 3 *Ib.* 590; *Re Batchelder*, 2 *Ib.* 150; *Re Winsor*, 16 *Ib.* 152.

For the opposing creditors it was contended that the bankrupt was a tradesman within the meaning of the law, and that the action of the district court in refusing the discharge was proper.

Seneca N. Taylor, for the opposing creditors.

Walker & Walker, for the bankrupt.

DILLON, *Circuit Judge*, orally.—I am prepared to decide the case of Stickney, before me on appeal from an order of the district court refusing to grant Mr. Stickney a discharge in bankruptcy.

It seems that for some years Merrick & Stickney were partners in this city. The record is a little meagre, but I gather from it this state of affairs: Merrick & Stickney were connected largely with a corporation formed under the statutes of the state, known as the St. Louis Stoneware Company, engaged in the business of manufacturing and selling stoneware; and they were the largest stockholders. Both bankrupts were officers—one president, and the other, I believe, secretary—of the corporation; and they were the largest, but not the only, stockholders. The corporation is not in bankruptcy, Merrick & Stickney being the bankrupts. Mr. Merrick is now dead. The district court refused Mr. Stickney a discharge solely on the ground that he was a tradesman, and had failed to keep proper books of account.

There were other objections to the discharge contained in the specifications, based on the ground of fraud. They were overruled as not being sustained, and no appeal was taken therefrom. But the fifth specification was to the effect that Merrick & Stickney did not keep proper books of account. The provision of the bankrupt act is that if any merchant or tradesman has not, since March 2, 1867—the date of the passage of the bankrupt act—kept proper books of account, it is sufficient ground of objection to his discharge. It makes no difference, under the bankrupt act, whether or not the failure to keep proper books is through inadvertence, negligence, or fraud; it

is sufficient ground for refusing his discharge, provided the bankrupt is a merchant or tradesman.

From what counsel stated on the argument, the chief emphasis and stress in the court below was upon the question whether the books that were actually kept were proper books. I have not those books before me, and if the case turned on them I would be obliged to hold that there was not sufficient certainty that the books were proper books to justify a reversal of the decision of the district court. Accordingly, the case turns on the question whether, under the circumstances, these bankrupts were merchants or tradesmen within the meaning of the bankrupt act. Now, all that the record discloses in this behalf is this: These men were large stockholders, and were main officers, in a corporation formed for the purpose of carrying on the business of manufacturing and selling stoneware. Now, I conceive that whether or not that corporation kept proper books is perfectly immaterial here, and it has not been attempted to show that it did not keep proper books of account —and, indeed, it was stated by one of the witnesses that it did. No contest was made on that ground. Now, then, were these men tradesmen or merchants? It appears that, as to their business outside of their connection with this corporation, they owned a farm in St. Charles county, and carried on business in connection with that farm, and sustained heavy losses; and it also appears that they were in the habit of borrowing money. It seems when they failed they owed between $200,000 and $300,000, mostly evidenced by promissory notes, and some certificates of deposit; but it did not appear that they carried on any business of merchandising, or held themselves out to the community in that capacity; and the authorities that were read here on the argument show, to my mind, quite conclusively, that, having imported this word "tradesman" from the English bankrupt act, it means—and has been so held by Judge LOWELL, of Massachusetts (in *Re Cote, supra*)—that the word "tradesman," as here used in the bankrupt act, has a very limited signification. It says, "if any merchant or tradesman

fails to keep proper books of account." Now, the English authorities hold that a man who owned land, or a man who rented land and has held it for a term of years, and carried on the business of brick-making as a means of realizing the profits to be derived from his land, is not a "tradesman," and they have said that the word "tradesman," as used in the bankrupt act, refers to smaller merchants or tradesmen, or a shopkeeper. And this was the meaning put upon it by the decision of Judge LOWELL; it means a smaller class of merchants.

I think that, in the present condition of the law, it is very clear that Merrick & Stickney, so far as shown by this record, were not tradesmen.

For this reason I will reverse the decision of the district court and order a discharge.

ORDERED ACCORDINGLY.

MORGAN *v.* ILLINOIS AND ST. LOUIS BRIDGE COMPANY—HAGAN'S PETITION.

1. The railway tunnel connecting the union depot in St. Louis with the Illinois and St. Louis bridge was, at a point where it was uncovered, and within the line of a public street, left unguarded, exposing a perpendicular wall fourteen feet in depth below the surface of the street. The petitioner, a boy four years of age, strayed away from his home, about two blocks distant, under circumstances not disclosed by the testimony, fell into this excavation, and sustained a fracture of the thigh bone. It appeared (1) that his parents were poor and unable to employ a servant to look after him; (2) that he sustained no other injury except physical pain and suffering; (3) that the tunnel was in custody of receivers of this court: *Held*, (1) that the unguarded excavation was a nuisance, the continuing of which rendered the receivers liable to pay out of the fund in their charge damages for any injury of which it was the proximate cause; (2) that the petitioner was in law incapable of negligence, and that the burden of showing contributory negligence on the part of the parents, such as, imputed to the petitioner, would bar a recovery, rested with the respondents.

2. The mere fact that a child four years of age strayed a distance of more than two blocks from home, at play with other children, is not of itself evidence of contributory negligence on the part of its parents.
3. Damages may be given in such a case where there is no other substantial element than physical suffering.

(*Before* DILLON, *Circuit Judge.*)

Dangerous Excavation.—Injury to Child.—Burden of Proof.—Damages.

THIS action was brought in the form of an intervening petition in a suit in equity which had been brought to foreclose a mortgage. This peculiar form of suit was necessitated by the fact that the property, the negligent construction of which produced the injury complained of, was in the hands of receivers appointed by this court. By consent of counsel, the petition was referred to Seymour D. Thompson, Esq., one of the masters in chancery of the court, who reported as follows:

"From the testimony I find the following facts: That on the 1st day of November, A. D. 1876, the receivers of this court, John P. Morgan and Solon Humphreys, were operating the structure known as the St. Louis tunnel, connecting the Illinois and St. Louis bridge with the union depot, in the city of St. Louis. That the said tunnel, as originally constructed, debouches from beneath the ground in the middle of Eighth street, in St. Louis, at the crossing of Clark avenue, and runs southwardly in the centre of Eighth street to Spruce street, which crosses it by means of a bridge; from which point said tunnel continues south a short distance, and then gradually deflects to the west, so that the western side of it crosses the western line of Eighth street at a point one hundred and forty-seven feet south of the Spruce street bridge. The uncovered portion of said tunnel thus runs within the limits of Eighth street for a distance of two blocks. The wall of said tunnel is surrounded by a flat coping of stone, about on a level with Eighth street, along which is built an iron railing, designed to protect men and animals

traveling along the street from falling into it. At a point about three feet north from where the western wall of the tunnel intersects the line of Eighth street in deflecting to the west, as already stated, this railing, at the time of the accident in controversy, stopped. At the point thus left unguarded within the line of Eighth street, the distance to the bottom of the tunnel was about fourteen feet. Beyond the point where the western wall of the tunnel crosses the western line of Eighth street, the coping descends in the form of a stairway, at an angle of forty-five degrees. A rough sketch returned into court, marked 'exhibit A to testimony,' gives a fair idea of the geography of the tunnel, as thus described. The road which runs along the western side of the open tunnel in Eighth street is by this curve in the tunnel deflected to the west over private ground, and is a constantly traveled thoroughfare.

"On the date already mentioned, November 1st, 1876, the intervening petitioner, John Hagan, was between three and four years of age. He lived with his parents upon Clark avenue, near Ninth street—a little more than two blocks distant from the point where the western wall of the tunnel crosses the western line of Eighth street, as already indicated. His parents were poor. His mother was obliged to do her own house-work, and they were unable to employ a nurse or servant to take care of him. He strayed from home, and, while at play with other children upon the unguarded coping of the tunnel, at the point already indicated, just within the line of Eighth street, fell into the tunnel and received a simple fracture of the thigh bone. This fracture is well healed; the leg is not shortened, or the limb deformed, except by a slight callous, which will gradually be absorbed. I find from the evidence that the petitioner received no other injuries from this fall than physical pain and suffering.

"Upon this state of facts three questions would seem to arise:

"1. Were the receivers guilty of negligence in permitting a portion of the wall of the tunnel to remain unguarded at a point within the line of a public street constantly traveled, where the

wall was perpendicular, where the excavation was fourteen feet deep, and through which trains were constantly passing? On this point I entertain no doubt. It seems to me clear that the tunnel company, leaving a portion of so dangerous an excavation unguarded at such a point, were the authors of a public nuisance, and that the receivers were continuers of it.

"2. Was there contributory negligence imputable to the plaintiff, such as should bar a recovery of damages? Children at the tender age of the plaintiff at the time of the injury complained of are in law incapable of negligence (*O'Flaherty* v. *Union Railway Co.* 45 Mo. 70; *Hartfield* v. *Roper*, 21 Wend. 615; *Mangam* v. *Brooklyn Railroad Co.* 38 N. Y. 455; *North Pennsylvania Railroad Co.* v. *Mahoney*, 57 Pa. St. 187); but the weight of authority is that the negligence of the parent, guardian, or other person lawfully in custody of a child which is injured, will be imputed to the child, so as to bar a recovery of damages. (*Hartfield* v. *Roper*, 21 Wend. 615; *Waite* v. *Northeastern Railway Co.* 28 Law Jour. [Q. B.] 258; *Ohio, etc. Railway Co.* v. *Stratton*, 78 Ill. 88; *Pittsburgh, etc. Railway Co.* v. *Vining*, 27 Ind. 513; *Lafayette, etc. Railway Co.* v. *Huffman*, 28 *Ib.* 287; *Kass* v. *Park*, 40 Cal. 188; *Fallon* v. *Central Park, etc. Railway Co.* 64 N. Y. 13; *Mangam* v. *Brooklyn Railway Co.* 38 *Ib.* 455; *Callahan* v. *Bean*, 9 Allen, 401; *Wright* v. *Malden, etc. Railway Co.* 4 *Ib.* 283; *Munn* v. *Reed*, *Ib.* 431; *Louisville, etc. Canal Co.* v. *Murphy*, 9 Bush, 522; *Down* v. *New York Central Railway Co.* 47 N. Y. 83; *Drew* v. *Sixth Avenue Railway Co.* 26 *Ib.* 49.) Yet some courts deny this, and upon grounds which seem entitled to much consideration (*Daly* v. *Norwich, etc. Railway Co.* 5 Conn. 591; *Government Street Railway* v. *Herndon*, 53 Ala. 70; *Norfolk Railway Co.* v. *Ormsby*, 27 Gratt. 455; *Philadelphia, etc. Railway Co.* v. *Long*, 75 Pa. St. 257). Whatever may be the correct rule on this subject, it is clear upon authority that parents situated as the parents of the plaintiff were—poor, the father absent at his daily labor, the mother obliged to do her

own house-work, unable to employ a nurse or servant to attend the child when upon the street — will not be deemed guilty of such negligence as will prevent a recovery of damages if the child is injured through the negligence of the defendant while straying upon the street unattended.

"3. In such a case, will damages be given on account of physical suffering where there has been no direct pecuniary loss? Upon this point I have some difficulty; but the tendency of the courts seems to be to sustain verdicts where the plaintiffs received no substantial injury except physical pain and mental suffering, unless the verdicts are so excessive as to create a presumption that the jury acted from passion or from prejudice (Sedgwick on Damages [6th ed.], 699, note 2; *Trimble* v. *Spiller*, 2 Munroe, 394; *Huckle* v. *Money*, 2 Wilson, 205; *Beardmore* v. *Carrington*, *Ib.* 244); and whether such damages are called 'exemplary damages,' or 'smart money,' or 'compensation for injured feelings,' seems to be more nearly a debate about terms and definitions than about any substantial differences which are capable of being traced and maintained in the administration of justice. (*Hendrickson* v. *Kingsbury*, 21 Iowa, 378; *Detroit Post Co.* v. *McArthur*, 16 Mich. 447; *Fay* v. *Parker*, 53 N. H. 342, 381; *McKinley* v. *Chicago and Northwestern Railway Co.* 44 Iowa, 321.) All the American courts seem agreed that physical suffering may be considered by the jury in estimating damages, even where the negligence was not gross or the injury so wilful as to warrant the giving of what are termed exemplary damages. (Sedgwick on Damages [6th ed.], 699, note 2; *Indianapolis, etc. Railroad Co.* v. *Stables*, 62 Ill. 313; *City of Chicago* v. *Langless*, 66 Ill. 361.)"

The report concluded by recommending a decree that the receivers pay the petitioner out of the funds in their hands $500 and costs.

Exceptions were filed to the foregoing report by the receivers, and on those exceptions the cause was submitted to the court.

Glover & Shepley, for the receivers.

A. R. Taylor, for the petitioner.

DILLON, *Circuit Judge.*—The only exception to the master's report relied on by the counsel for the receivers, is that the master erred in not finding that the parents of John Hagan were negligent, and that such negligence defeats the right of the infant to recover the amount of the damages sustained by the negligence of the receivers. In the excellent report of the master, the principal cases upon the effect of the negligence of parents in defeating the right of action for a negligent injury to their child are collected. They cannot be entirely reconciled, although, when the facts of the particular cases are considered, the discrepancy is not as great as at first it would appear to be.

Upon the facts in this case, we entertain no doubt that the petitioner is entitled to compensation for the injury he sustained. The deep, unguarded excavation in the street was not only a public nuisance, but a dangerous one. The receivers ought not to have permitted it to continue. The natural instincts and habits of children lead them to play; and it is scarcely possible, and certainly not practicable, to keep them entirely off the streets, or under constant supervision. The injury here was not caused by any person or agency in the lawful use of the street. What right has the tunnel company to leave a dangerous pitfall in the public way, and then to insist that all the children in the neighborhood shall be imprisoned or kept off the street? If the petitioner's parents had lived immediately upon or very near this excavation, and, knowing the danger of permitting their child to go at large, had actually permitted it to go to the place of danger, or suffered this to be done through actual negligence, the case might present more difficult questions than now arise. The master does not find that the child was knowingly, or even negligently, permitted to go to, or remain in, the vicinity of the excavation. His parents lived over two blocks distant, and the finding is that he "strayed away from home," and was injured

while at play with other children. It is not shown that the child was in the habit of going there; and as the receivers' negligence is positive and actual, and was the direct cause of the injury, and as the *onus* to establish the defence of contributory negligence is on the receivers (*Railroad Co.* v. *Gladman*, 15 Wall. 401), and they have failed to show such negligence, they are liable. It is not necessary, in this view, to go into the learning upon the subject of imputable negligence of parents to children, for in this case it is not shown that the parents were at fault in the child being at the place of the accident at the time when the accident happened. Some of the cases seem to make the liability depend upon the means of the parents, and to countenance a distinction as to contributory negligence between parents able to employ nurses or attendants and those who are not. This distinction may be doubted, for there is not, in this country, one rule of law for the rich, and a different rule for the poor. It extends its protecting shield over all alike. The common law is justly distinguished for its solicitude for the public safety, and any person or corporation that illegally imperils the lives, limbs, or health of the people is liable. The tunnel company has no more right, by having a dangerous excavation in the public ways, unnecessarily to impose upon the rich the duty to employ an attendant for their children than to impose upon the poor the impracticable duty of never allowing their children to escape from sight, lest they may be injured by its wrongful and illegal act. (5 South. Law Rev. 684.)

The exceptions are overruled, and an order will be entered in conformity with the report of the master.

ORDERED ACCORDINGLY.

NOTE.—"'People in the situation of life of those who had custody of the child,' said WAGNER, J., in a recent case, 'cannot always attend to it strictly; and if it escapes from them unawares, it must not be injured simply because it so escapes.' (*Isabel* v. *Hannibal, etc. Railway Co.* 60 Mo. 483.) In another case the same learned and humane judge, discussing this question, said: 'To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant,

would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants, and would amount to a denial of these blessings to the poor.' (*O'Flaherty* v. *Union Railway Co.* 45 Mo. 74.) In a case very similar to this, another very learned and capable judge used the following language: 'The doctrine which imputes the negligence of the parents to the child in such a case as this is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger, necessarily requiring the care of the adult to be constantly exercised, as where a parent takes a child into the cars, and, by his neglect, suffers it to be injured by straying off upon the platform. But here a mother, toiling for her daily bread, and having done the best she could, in the midst of her necessary employment, loses sight of the child for an instant, and it strays upon the track. With no means to provide a servant for the child, why should the necessities of her position in life attach to the child, and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incapable of contributing to it; then why should the wrong not be compensated?' (AGNEW, J., in *Kay* v. *Pennsylvania Railway Co.* 65 Pa. St. 276.) The same views are reasserted in *Philadelphia, etc. Railway Co.* v. *Long*, 75 Pa. St. 257.

"In *Littlefield* v. *Atlantic and Pacific Railway Co.* (intervention of McAuley), the learned district judge, sitting in this court, awarded an old man $500 as damages on account of having been wrongfully expelled from a passenger train of the receivers by its conductor, and compelled to walk three miles, crossing a high and dangerous bridge, to get to his home. This was a case for *exemplary damages*. On the other hand, in *West* v. *Forrest* (22 Mo. 344), the defendant, in beating a female slave, accidentally inflicted some blows upon her mistress, the plaintiff. There does not appear to have been any attempt to prove that the plaintiff had suffered any direct pecuniary loss. The court sustained a verdict for $400, saying: 'The plaintiff's case was fully made out before the jury, and by their verdict of $400 they exhibited their sense of such a wrong, and properly vindicated the injuries and wounded feelings of the plaintiff.' In *Crocker* v. *Chicago and Northwestern Railway Co.* (36 Wis. 657), a railway conductor kissed a female passenger. Here was certainly no direct pecuniary loss; but the company was compelled to pay $1,000 for it. The damages were expressly placed upon the ground of *compensation*. In *McKinley* v. *Chicago and Northwestern Railway Co.* (44 Iowa, 314), the plaintiff was forcibly and successfully resisted by a brakeman in attempting to enter a passenger car of the defendant. There is no statement of the evidence as to the loss of time incurred or actual injury received; but these appear to have cut no figure in the

case. It was charged by the court below, and held by the court above, that it was not a case for exemplary damages. The discussion related to the propriety of an instruction that the jury might take into consideration and give damages for 'the outrage and indignity' put upon the plaintiff. The instruction was held correct. Twelve thousand dollars damages were held to indicate passion and prejudice; but the court ordered the verdict to stand, if the plaintiff would accept a judgment for $7,000. BECK, J., however, thought $12,000 not too much, and DAY, J., dissented, holding that outrage, indignity, and mental suffering are not elements of compensatory damages. In *City of Chicago* v. *Jones* (66 Ill. 349), an award of $1,000 to a servant girl for breaking her right arm was not deemed excessive. In *Collins* v. *Council Bluffs* (32 Iowa, 324), $15,000 were awarded a married woman for the breaking of the bone of her left thigh, in consequence of ice accumulated on the sidewalk. It appeared that it made her a cripple for life. The court refused to disturb the verdict." [The foregoing is extracted from the master's report.]

LEVI *v.* NATIONAL BANK OF MISSOURI.

1. A bank, acting as the collecting agent of another bank, has, in the absence of special authority or usage, no right to receive in payment anything but money; if it receives the check of the debtor on another bank, this is conditional payment only, and it becomes the agent of the drawer of the check to receive the money thereon, and until the money is received the payment is not complete.
2. The defendant bank received from the plaintiffs, their correspondent, a bill of exchange "for collection and credit," and accepted from the drawee his check on a third bank for the amount, and surrendered the bill of exchange. On presenting the check, instead of demanding the money thereon, it accepted its certification as good, and suspended the same day, having previously credited the plaintiffs with the amount. On the day after its suspension it collected the certified check. A receiver having been appointed, the amount, mingled with other moneys, came into his hands. The question was, whether the defendant bank was a general debtor to the plaintiffs for the amount, or whether the money received on the check was held by the receiver in trust for them; and judgment of the court was for the plaintiffs.

(*Before* DILLON, *Circuit Judge.*)

Levi *v.* National Bank of Missouri.

Bank as Collecting Agent.—Payment by Check.—Certification of Check.—Failure of Collecting Bank.—Right to Collect and Credit after Suspension.

THIS is a suit in equity, wherein the plaintiffs seek to recover from the defendant a certain sum of money which they allege the receiver of the defendant—the National Bank of the State of Missouri—has in his possession, which is the proceeds of a certain draft drawn by August Taussig on the firm of Taussig Brothers & Co., St. Louis, for $10,000, which said plaintiffs forwarded to the defendant on the 18th day of June, 1877, "for collection and credit." This sum of money the plaintiffs claim on the ground that the said bank did not collect it until after its suspension, on the 19th day of June, 1877, and therefore holds the money as plaintiffs' agent. The plaintiffs also seek to recover said sum of money on the ground that the directors of the defendant bank received said draft for collection after they had knowledge of the fact that the bank was insolvent, and on the very day the bank suspended payment, and that, therefore, the receipt by the defendant bank of said money was a fraud on the plaintiffs, and they are entitled to the full proceeds.

To this bill the defendant filed an answer, putting in issue the averments of the plaintiffs' bill, and stating the facts of the transaction specially; to which answer the plaintiffs replied.

The facts, so far as material to the ground of the court's judgment, are, shortly, these: The defendant bank was the correspondent of the plaintiff bank. On June 18th, 1877, the plaintiffs transmitted to the defendant bank, "for collection and credit," a draft or bill of exchange for $10,000, drawn by one August Taussig on the firm of Taussig Brothers & Co., St. Louis. This was received by the defendant bank on the morning of June 19th, and the amount provisionally credited on account to the plaintiffs. The defendant bank on the same day presented the bill of exchange for payment, and received from Messrs. Taussig Brothers & Co. their check for the amount on

the Franklin Savings Bank, of St. Louis, and thereupon surrendered the bill of exchange. This bill of exchange was specially endorsed to the defendant bank for collection, on account of the plaintiffs. On the same day (June 19th) the defendant bank presented this check, and had it certified as "good" by the Franklin Savings Bank, and took it away; and on the same day the directors of the defendant bank resolved that "all payments shall be suspended, and all its banking business shall cease, except to collect and preserve its assets." It never again opened its doors.

The next day after the suspension its officers collected the amount of the certified check, and a receiver having been appointed by the comptroller of the currency, the money thus collected, having been mingled with the other money of the bank, came into his hands. No notice to the plaintiffs of the provisional credit was given until after the check had been collected, on the 20th day of June.

The defendant bank was hopelessly insolvent at the time, and had been known to be so for a considerable time by its executive officers and a majority of the directors; but as the judgment of the court does not proceed upon the distinct ground that the collection of the draft was for this reason fraudulent, the particular facts in this regard need not be stated in detail.

Two questions were argued:

1. Whether or not the defendant, Johnson, as receiver of the said bank, holds the amount of money so collected as a trustee for the plaintiffs, or whether they are simple contract creditors for said amount, and entitled only to their dividends as other creditors.

2. Whether or not the insolvency of the bank, together with the facts in evidence in relation to the knowledge of its directors of its insolvency, rendered the collection of the money by defendant bank a fraud against plaintiffs, so as to entitle them to recover the full amount of the proceeds of said Taussig draft.

William Patrick and *Nathan Frank*, for the complainants.

Henderson & Shields, for the defendant.

DILLON, *Circuit Judge.*—It is only necessary to decide the first of the above questions, although counsel have discussed both of them with great fulness, and referred to numerous cases. While these cases have been considered, I do not feel called on to examine them at length in this opinion, for, in my judgment, on the facts here presented, the principles of law decisive of the case are clear and well settled.

In respect of the Taussig draft, out of which the controversy arises, the defendant bank was the collecting agent of plaintiffs. This is manifest from the relations of the two banks to each other, from the letter transmitting this draft "for collection and credit," and from the plaintiffs' special endorsement thereon to the cashier of the defendant bank "for collection on account of" the plaintiffs. This relation was not only known to the two banks, but knowledge of it—that is to say, that the defendant bank was merely the agent to collect this draft for the plaintiffs, and not the holder of it in its own right—was imparted to the drawees of the draft, the Messrs. Taussig Brothers & Co., by the above-mentioned special endorsement of the plaintiffs on the draft itself, and which was surrendered to the drawees when their check for the amount thereof on the Franklin Bank was received.

What, then, was the duty of the defendant bank, and the rights and obligations of the drawees, the Messrs. Taussig Brothers & Co.?

It was the duty of the defendant bank, as the collecting agent of the plaintiffs, to present the draft for payment; and as there is no proof of any special authority to the defendant, or agreement or usage varying the legal rights of the parties, the defendant bank could receive in absolute payment thereof nothing but money, "that which the law declares to be a legal tender, or which, by common consent, is considered and treated as money."

(*Ward* v. *Smith*, 7 Wall. 452.) This settled principle of law has not been drawn in question by the defendant's counsel.

As the defendant bank was not authorized to receive payment except in the manner above stated, and as the Messrs. Taussig Brothers & Co. knew that the defendant bank did not hold the draft as their own, but as agents to collect, they are charged with knowledge that they could only make a valid payment binding upon the plaintiffs by making such payment in money.

Their check for the amount of the draft would, at most, be but conditional payment—that is, payment when the money was actually received thereon by the agents of the plaintiffs. Even if the defendant bank had undertaken by a special agreement to receive the check in absolute payment (of which there is no pretence), such an agreement would have been void for want of authority from the plaintiffs to make it.

When the check was received in exchange for the draft, the drawers of the check must be taken to have constituted the defendant bank their agents to collect the check, in order that its proceeds might be paid to the plaintiffs. Without special authority to the defendant bank to take a check in absolute payment, or without ratification of its act in receiving a check instead of money, this act of the defendant would not bind the plaintiffs *ex proprio vigore*. The latter could affirm or disaffirm it, as they might elect. If the money had been received on the check by the defendant bank before its suspension, this would have presented a very different question from the one which actually arises.

The check was presented, but instead of payment being demanded and received, a certification of it was accepted. That was an act which did not bind the plaintiffs—for it was alike without their knowledge or authority. If this was done by the defendant bank without authority from the Messrs. Taussig Brothers & Co., it might, as between them and the bank, discharge them as drawers of the check, but it could not operate to pay the bill of exchange for which the check was given, or in any manner vary the rights of the plaintiffs. Their debt sub-

sisted until payment was made by Messrs. Taussig Brothers & Co., and no payment was made until the check was actually paid, which was the day after the failure of the defendant bank and its resolution to cease business and wind up its affairs. It is, therefore, a mistake to suppose that the act of the defendant bank, in originally receiving the check of the Messrs. Taussig Brothers & Co., or in subsequently procuring it to be certified, discharged Taussig Brothers & Co. from their liability to the plaintiffs. I am, therefore, of opinion that the defendant bank remained the agent of the plaintiffs to collect the bill of exchange on Taussig Brothers & Co. until the money was actually received. When the money was received, and not before, the agency of the defendant bank to *collect* terminated, and its authority to credit the amount to the plaintiffs and to make itself an absolute debtor therefor would then arise, provided it was still a going concern; but inasmuch as before it received the money it had failed, its agency to constitute itself a general creditor for the amount had ceased to exist. It would hold the amount as the agent of the plaintiffs, or in trust for it, subject to any balance due it from the plaintiffs.

Against this view the defendant urges two objections. The first is thus stated in the defendant's printed argument: "The letter transmitting the draft was simply asking for '*credit*'—the depositing of the Taussig draft by the plaintiffs in the defendant bank. The words 'for collection and credit' mean 'credit.' While it is reasonable to suppose that the defendant bank would not give the credit until it was satisfied that it would obtain the money on the draft, yet the ultimate object of the plaintiffs being 'credit,' if they receive the credit, it matters not to them whether the defendant bank received the money or not; and as soon as the defendant bank was satisfied to give the credit, as requested, the plaintiffs' demand was complied with, whether the collection was ever made or not."

The argument is fallacious. The words "for collection and credit" do not mean that the credit shall be given until the money is collected. And it does make a difference whether the

defendant bank ever received the money or not. On this point the language of BYLES, J., in *Sweeting* v. *Pearce*, 7 C. B. (N. S.) 485, is applicable. He says: "It is not disputed that the general rule of law is that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to the principal; but if he is allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over; at all events, it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule, cannot receive payment in anything but cash." This language is approved in the case of *Pearson* v. *Scott*, decided in the chancery division of the high court of justice, May 4th, 1878 (18 Albany Law Jour. 193).

The second objection of the defendant's counsel to the view above stated, is "that, even if the defendant bank was the agent of the plaintiffs for the collection of the Taussig draft, and had no right to receive payment thereof in anything but money, the acceptance of the Taussig check, and having it certified, by defendant bank was a simple breach of their duty as such agents, for which they became instantly liable, on the 19th day of June, as a simple contract debtor." I answer that it has been shown above that the act of the defendant bank in having the check certified wrought no change in the plaintiffs' rights, and that their debt still remained. This unauthorized act, if it resulted in any injury to the plaintiffs, would undoubtedly give them a right to recover any damages suffered thereby, but it did not dissolve or terminate the relationship of principal and agent between the plaintiffs and the defendant bank, nor preclude the plaintiffs from the right to elect to ratify the act of receiving the check, and to claim the money afterwards collected thereon.

The force of the argument of the defendant's counsel, that the defendant bank, on the very day of its failure, and when it was *in articulo mortis*, had the right, by a credit in advance of collection, or by its unauthorized act in receiving the check and

in procuring its certification, to terminate, without the plaintiffs' consent, the agency, and to constitute itself the actual debtor for the amount, against the plaintiffs' will and against their interest, I must confess I have been unable to perceive.

It is not unusual for bankers to credit their correspondents or customers with the amount of paper of a certain character at the time of its receipt for collection, but such credits are provisional only, being made in anticipation that the paper will be promptly paid, and with the right to cancel the credit if the paper is dishonored. (*Trinidad National Bank* v. *Denver National Bank*, 4 Dillon, 290; 7 Cent. Law Jour. 170.) Such was the nature of the credit made in this instance, and the circumstance is immaterial, as it does not vary the ultimate rights of the parties.

The conclusion, therefore, is that the defendant bank was the agent of the plaintiffs to collect the draft on Taussig Brothers & Co.; that the agency remained until the money was received on the check, and as this was after the defendant bank had ceased to do business, and had resolved to wind up its affairs, it was received in trust for plaintiffs (less the plaintiffs' indebtedness to the defendant bank); and hence the receiver has no right to hold it, to be distributed ratably among the general creditors of the bank.

Let a decree be entered for the plaintiffs for $8,168.58, with interest from the date of the commencement of this suit at the rate of six per cent per annum.

TREAT, J., did not sit.

DECREE ACCORDINGLY.

NOTE. — Liability of bank as a collecting agent: *Trinidad Bank* v. *Denver Bank*, 4 Dillon, 290; *St. Louis* v. *Johnson*, *post*.

WESTERMANN *v.* CAPE GIRARDEAU COUNTY.

1. The supreme court of the United States having held the "Township Railroad Act" of Missouri constitutional (*Cass County* v. *Johnson*, 95 U. S. 360), it is the duty of the circuit court to follow that judgment, notwithstanding the later decision of the supreme court of Missouri to the contrary.
2. Where negotiable commercial securities are issued and negotiated *before* there are any decisions by the courts of the state against the validity of the act authorizing their issue, the supreme court of the United States does not consider itself bound to follow a *subsequent* decision of the local courts invalidating such securities, but will decide for itself whether, under the constitution and laws of the state, such securities are valid or void.
3. The bond sued on being in the hands of a *bona fide* holder, containing a recital that it was issued to pay for a subscription to the Cape Girardeau and State Line Railroad, the county cannot be heard to say that the subscription therein specifically recited was not made.
4. The fact that the requirement of a two-thirds vote is contained in a provision of the constitution instead of a legislative enactment, makes no difference in principle.

(*Before* DILLON, *Circuit Judge.*)

Railway Aid Bonds.— Conflicting Decisions of State and Federal Courts.

THE facts appear in the opinion.

Finkelnburg & Rassieur and *Kehr & Tittman*, for the plaintiff.

Louis B. Houck, for the defendant.

DILLON, *Circuit Judge*, delivered the following oral opinion:

This is an action by the plaintiff on what are known in this state as township railroad aid bonds.

The question now to be decided arises on a demurrer to several pleas or special defences. First, the petition does not set forth, as it is advisable to do, a copy of one of the bonds to which the coupons in suit were attached. The nature of the

obligation, however, is stated in the petition: That in the year 1869, the defendant, the county of Cape Girardeau, issued a bond on behalf of Cape Girardeau township, negotiable in form, to the Cape Girardeau and State Line Railroad Company or bearer, and containing this recital: "This bond is issued pursuant to an order of the county court of said county, made by authority granted by an act of the general assembly of the state of Missouri, entitled 'an act to facilitate the construction of railroads in the state of Missouri,' approved March 23d, 1868, in payment of the subscription made to the capital stock of the said Cape Girardeau and State Line Railroad Company by the municipal township of Cape Girardeau, and authorized by a vote of more than two-thirds of the voters of said township, at an election held for that purpose in said township on the 13th day of April, 1869."

That is the first act in this state, and I believe the only act, that authorized townships to aid railroads by subscriptions and the issuing of bonds.

Now, about six years ago the question of the validity of this subscription came before the supreme court of the state of Missouri, in the case of *Ranney* v. *Baeder* (50 Mo. 600). The objection urged in that case against the validity of that subscription was, that the particular railroad to which the subscription was made was not specified with sufficient certainty in the petition of the tax-payers asking for the submission, and in the order of the county court making the subscription. In that case the petition, and all orders of the county court in reference to the subscription, were before the supreme court of the state, and the result was that it was adjudged a valid one. Judge WAGNER, after referring to a case in the supreme court of Missouri, and one in the supreme court of the United States, says: "The two cases just referred to show that there must be reasonable certainty in the matter of voting and ordering the subscription, and that the subscription must be made to the road authorized in the power delegated to the agent. Tested by these principles, we think the subscription in this case was entirely valid. As no

other fault is found with the proceedings, and as every step taken seems to have been done in a formal and regular manner, I entertain no doubt about the subscription. The objections urged are entirely too refined and technical."

And the judgment of the court below, holding this an invalid subscription, was reversed. That was in 1872. That is the precise objection that is reproduced in the fifth plea in this case; and we are asked to say that these bonds are invalid because the particular railroad was not specified with sufficient certainty in the proceedings.

There are two objections to holding this to be good: The first is that the supreme court of Missouri, in 1872, decided that these proceedings, in a case where the whole record was before it, were regular. But it is now urged that Judge WAGNER was mistaken in reference to the charter and amended charter recited therein. I think it very doubtful whether he was; certainly a bondholder cannot be supposed to know more in relation to this matter than the supreme court of Missouri. However that may be, this bond recites on its face that it was issued to pay for a subscription made to the Cape Girardeau and State Line Railroad. The county court cannot be heard, when the bond is in the hands of a *bona fide* holder, to say that the subscription therein specifically recited was not made. That disposes of this plea.

Another defence is that the act of March 23d, 1868, under which these bonds were issued, was unconstitutional, and that that has been held to be so by the supreme court of the state of Missouri in several recent cases, in two respects — one because the constitution requires the assent to this subscription to be given by two-thirds of the qualified voters of the township, whereas the act of 1868 authorizes that assent to be given and the subscription to be made if two-thirds of the qualified voters voting at the election shall assent. That presents a question upon which there has been a great conflict of judgment between the supreme court of the state and the supreme court of the United States. In the *Linn County Case* (44 Mo. 504, 1869), the ques-

tion of the issue of bonds under this act came before the supreme court, and they actually compelled, by *mandamus*, a reluctant county court to issue bonds under this very act, and of course it was implied in that judgment that the act under which these bonds were issued was constitutional. The particular point, perhaps, now urged against the validity of this act was not before the court.

A hundred cases—and I do not think I exaggerate—have been brought on these township bonds in the federal courts of this state, and prior to the decision of *Harshman* v. *Bates County* (3 Dillon, 150, s. c. 92 U. S. 569, 3 Cent. Law Jour. 506), none of the able lawyers defending these cases ever made a point that the act of March 23d, 1868, was unconstitutional. But when the case to which I have just adverted went to the supreme court of the United States, counsel did make that question, and that court, in its first decision, held that the point was well taken, and that the act of March 23d, 1868, was unconstitutional.

The same question was brought before the supreme court in another case (*Cass County* v. *Johnston*, 5 Cent. Law Jour. 506, s. c. 95 U. S. 360), and more deliberate consideration was given to it; and it reversed its first judgment, and held that this act was not open to the constitutional objection urged. That is the last judgment of the supreme court of the United States on this question. Since that decision the supreme court of Missouri held that the act is in conflict with the constitution on that ground, and also that the 5th section, which in effect requires that the proceeds of state and county taxes on railroad property be applied to the liquidation of these bonds, invalidates it. And it is an undisputed fact that the law of the state of Missouri has been declared by its supreme court to be that these bonds cannot be enforced, and that if this action was in a state court instead of here, it is agreed that the defendant would have judgment.

Now, the question is, what is the duty of this court, with a judgment of the supreme court of the United States in full force and unreversed, declaring these bonds constitutional, and a subsequent judgment of the supreme court of the state holding that

this act is in violation of the constitution of the state? That is not a new question in the history of bond litigation in this country. I had occasion to consider it in a case before me at the last term of the United States circuit court for the western district of this state, and what I said there, on that occasion, expresses my views on this. (*Foote* v. *Johnson County*, 6 Cent. Law Jour. 345, s. c. *post.*)

[The court here quoted at large from the opinion in the case just cited.]

And this is our own judgment now.

There is another plea here, to the effect that, in point of fact, two-thirds of the qualified voters of the township did not vote for this subscription, but it alleges no notice of that fact to the bondholders; and the recital in the bond is that this subscription is authorized by a vote of more than two-thirds of the voters, and that the vote was duly taken. It is urged, however, that, inasmuch as there are provisions of law in force requiring the registration of voters, and this requirement was embodied in a constitutional provision, that makes a distinction between this case and the case decided by the supreme court, where the requirement of a precedent vote was by a mere statute. It makes no difference in principle that the requirement of a two-thirds vote is contained in a provision of the constitution rather than a legislative enactment.

The demurrer to the pleas will be sustained.

JUDGMENT ACCORDINGLY.

Re KIRKBRIDE.

Under the legislation of Missouri, as construed by the supreme court of the state, a recorded mortgage upon merchandise and fixtures, free from actual fraud, where there is an implied power in the mortgagor to sell the merchandise in the usual manner, but no such power as respects the fixtures, is void as to creditors so far as relates to the merchandise, but valid as to the fixtures.

(*Before* DILLON, *Circuit Judge.*)

Re Kirkbride.

Chattel Mortgages.—Effect of Power of Sale retained by Mortgagor.—Void in part, not necessarily Void in toto.—Construction of Missouri Statute by State Court followed.

THE bankrupt, a retail druggist, made a chattel mortgage upon his stock of drugs and the fixtures in the store to secure the purchase money of the establishment. It was duly executed, acknowledged, and recorded. The grantor remained in possession, making sales from the stock in trade in the usual manner by retail. The mortgage was silent as to his power to do this, but no objection was made to his doing so by the trustees or the beneficiary. As between the assignee in bankruptcy and the beneficiary in the mortgage, the question is presented whether the mortgage is a valid lien as against the fixtures, no claim being made that it is valid as respects the stock in trade.

William P. Wade, for the assignee.

Noble & Orrick, for the mortgagee.

DILLON, *Circuit Judge.*—It is by statute (section 1 of the statute on fraudulent conveyances, quoted *Re Werner, infra*), as construed by the supreme court of the state, the law of Missouri that a conveyance of personal property to secure creditors when the grantor, by the understanding of the parties, expressed or implied, is to remain in possession of the property, with a power of sale, is void upon a principle of public policy embodied in the state, irrespective of any question of actual and intended fraud. The rules rest, says NAPTON, J., upon this principle of public policy, and not because the law pronounces such a conveyance with power of disposition "conclusive of actual fraud." (*State* v. *Tasker*, 31 Mo. 445; *State* v. *D'Oench*, *Ib.* 453.)

The conveyance in the present case is free from any actual fraud. It embraces two classes of property—stock in trade of a druggist, and the fixtures of the establishment. No express power of disposition in the grantor was reserved in the deed, but the trustees and beneficiary permitted the grantor to sell from

the stock in trade in the usual manner—that is, they knew that he was doing so, and did not object thereto. But the grantor never attempted to sell the fixtures, and claimed no right to do so. The question is whether, since the conveyance would, as to creditors, be void as to the merchandise, by reason of the power of disposition which it may be inferred it was understood should be retained by the grantor, it is therefore void as to the fixtures, which it is equally clear it was understood should not be sold by the grantor. It is claimed that if the instrument is void in part, it is for that reason necessarily void *in toto*. Outside of Missouri, the decisions on the point (perhaps somewhat influenced by peculiar statutory provisions) are conflicting. That such a deed, if void in part, is void altogether, is asserted in the following cases: *Russell* v. *Winne*, 37 N. Y. 591; *Re Burrows*, 5 Cent. Law Jour. 241; *Horton* v. *Williams*, 21 Minn. 187. But in the following cases the contrary is held: *Barnet* v. *Fergus*, 51 Ill. 352; *Re Kahley*, 2 Biss. 383.

I have carefully examined the following cases, decided by the supreme court of Missouri, touching this point: *State* v. *Tasker*, 31 Mo. 445; *State* v. *D'Oench*, *Ib.* 453, and *Stanley* v. *Bunce*, 27 *Ib.* 269, as explained in its facts by NAPTON, J., in *State* v. *Tasker*, *supra*, p. 448, and *Howell* v. *Bell*, 29 Mo. 137, as also explained in *State* v. *Tasker*, p. 449. I am entirely satisfied that these cases show that when the conveyance is not actually fraudulent, and where the power of disposition is retained as to part of the property, and as to part it is not retained, it is constructively fraudulent only as to that portion of the property as to which the power of disposition exists. In this case the mortgage was *recorded*, and presents no question as to the rights of creditors in cases where no record of the instrument was made, as contemplated by other sections of the statute concerning fraudulent conveyances. It is the duty of this court to follow the construction which has been put upon the statute by the supreme court of Missouri.

AFFIRMED.

NOTE.—See *Re Werner*, *infra*.

Re WERNER.

The assignee in bankruptcy, as the representative and trustee for the general creditors, may impeach the validity of a chattel mortgage void by local statute as to creditors because not recorded, and has all the rights in this respect that an attaching or execution creditor would have had if bankruptcy had not supervened.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act.—Chattel Mortgages.—Registration.—Void in Missouri if not Recorded.—Assignee in Bankruptcy may Impeach.

THE bankrupts, within sixty days of the proceedings in bankruptcy, made a chattel deed of trust upon their stock in trade, fixtures, and a leasehold interest, to secure a debt created at the time, in favor of Rumsey & Co. There was no actual fraud. The said deed of trust was never recorded, nor was possession ever taken under it. The mortgagors remained in possession, and carried on their business (plumbers) as before.

The question presented arises between the assignee in bankruptcy and the mortgagees. That question is, whether the security of the deed of trust (a mortgage in effect) is effectual as against the assignee in bankruptcy as respects the stock in trade, or the fixtures, or both. The district court held it invalid as to the stock in trade, but otherwise to be effectual. The mortgagees and the assignee bring cross-bills of review.

Collier & Muench, for the assignee.

D. Dillon, for the mortgagees.

DILLON, *Circuit Judge.*—This case is different from *Kirkbride's Case*, decided at this term (*ante*, p. 116), which involved a construction of section 1 of the statute of fraudulent conveyances. That section is as follows:

"Every deed of gift and conveyance of goods and chattels in trust to the use of the person so making such deed of gift or

conveyance, is declared to be void as against creditors, existing and subsequent, and purchasers."

This case involves a construction of section 8 of the same statute, which is in these words:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other persons than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee, or *cestui que trust*, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded."

The bankrupt act declares that property disposed of in fraud of creditors shall pass to the assignee. It also contains a provision that no chattel mortgage "made in good faith and for present consideration, and otherwise valid, and duly recorded pursuant to the statutes of any state, shall be invalidated or affected by the bankrupt act."

Under section 8 of the statutes of the state relating to fraudulent conveyances, above quoted, it is not denied by the counsel for the mortgagees, since the instrument was not recorded, nor possession taken under it, that it would be fraudulent and void as to attaching or execution creditors.

Such is the plain reading of the statute, and such is the settled construction of the statute in this state. But the point relied upon is that, since the instrument is good between the parties, the assignee, as the representative of the general creditors, having no lien of any kind, cannot impeach it. Such would seem to be the opinion of Mr. Justice HUNT, in *Re Collins* (12 Nat. Bankr. Reg. 379), decided on the circuit, and there are some other decisions lending more or less support to this view. (6 Am. Law Rev. 50.)

But, on principle, as well as on the weight of authority, I think this view is erroneous. It was so decided in this court in

Allen v. *Massey* (1 Dillon, 40, 44), in 1870, and the judgment was affirmed in the supreme court (17 Wall. 371). The bankrupt act "takes out of the hands of creditors [to a large extent] the ordinary remedial processes and suspends the ordinary rights which by law belonged to creditors, and substitutes in their place a new and comprehensive remedy, designed for the common benefit." (CURTIS, J., in *Betton* v. *Valentine*, 1 Curtis, 168, 176.) And in this sense it is that an adjudication of bankruptcy has been said to be "a statute of execution for all the creditors." (*Re Foster*, 2 Story, 131, 142.)

And on the precise point involved in this cause, Mr. Justice STRONG says: "I think, notwithstanding some decisions to the contrary, an assignee in bankruptcy of the mortgagor stands in the position of such creditors [judgment or lien creditors] with equal rights, the adjudication of bankruptcy being equivalent to the recovery of a judgment and levy." (*Mellier* v. *Jones*, 15 Nat. Bankr. Reg. 150.) To the same effect is the well-reasoned opinion of DRUMMOND, J., in *Re Gurney*, 15 Nat. Bankr. Reg. 373; of WOODS, J., in *Baker* v. *Smith*, 12 *Ib.* 474; of WOODRUFF, J., in *Re Leland*, 10 Blatchf. 503; and of CURTIS, J., in *Carr* v. *Hilton*, 1 Curtis, 230. The briefs of counsel contain a reference to other cases to the same effect.

The order below will be reversed and the deed of trust declared to be wholly void, under the 8th section of the statute concerning fraudulent conveyances.

In order to have the point settled without delay in the administration of the estate, the district court ruled in favor of the claimant at the close of the term. The district judge, however, states that he is of opinion that his former ruling was erroneous, inasmuch as the mortgage was recorded *after* the proceedings in bankruptcy and other rights under the bankrupt act had intervened. Hence the doctrine laid down in *Sawyer* v. *Turpin* (1 Otto, 114), is not applicable. The conclusion reached in this opinion meets with his full concurrence.

JUDGMENT ACCORDINGLY.

THOMAS J. WOOD *v.* CITY OF LOUISIANA.

A municipal corporation issued bonds valid on their face, but in fact void, because they were antedated to evade the registration act, and were not registered; the corporation had power to borrow money, and the proceeds of the bonds passed into the city treasury and were used for lawful purposes: *Held*, that the corporation was liable in an action for money had and received to the purchaser of the bonds or his assignee, not for the amount of the bonds, but for the amount of money actually paid for the bonds to the corporation, with simple interest thereon.

(*Before* TREAT, J.)

Municipal Corporations. — Registration Bond Act of Missouri of March, 1872. — Ultra Vires. — Implied Assumpsit.

THIS was an action for money had and received by the defendant from the plaintiff in part, and in part from the plaintiff's assignors. The city received the money sued for as the consideration of certain bonds issued by it, and *antedated* so as to evade the local registration act of March, 1872, which was construed in *Anthony* v. *Jasper County* (4 Dillon, 136). Apparently the bonds were valid. If the true date had been that named in the bonds, no registration was necessary. The bonds were never registered, and for this reason the city repudiated any obligation to pay them. The plaintiff and his assignors did not know that the bonds had been antedated. The defendant demurred to the petition.

C. H. Krum, for the plaintiff.

David Wagner and *D. P. Dyer*, for the defendant.

TREAT, J. — This is a suit for money had and received by the defendant from the plaintiff and plaintiff's assignors.

The officers of the defendant, in order to evade the Missouri act of March, 1872, requiring registration, antedated certain bonds, which subsequently were bought by the plaintiff and his

assignors, in open market, at ninety cents on the dollar. Those bonds were void for non-registry. If they had not been antedated — that is, if they had been executed and issued in fact as on their face they purported to have been — they would have been valid and obligatory.

As the city had power to borrow money for the purposes defined in its charter, is it to be held liable for the money thus borrowed through sale of bonds which were void from non-compliance with the registry act? The fraudulent contrivances of the defendant's agents, whereby through invalid bonds they obtained the money of the plaintiff and his assignors, ought not to preclude the plaintiff from recovery, if he was a *bona fide* holder for value, to the extent that the defendant actually received the money therefor, provided there was lawful authority to borrow money for the purpose for which the same was received and used. If money was obtained by the defendant through such invalid contrivances, and the same could have been lawfully borrowed in another manner, and if the money thus procured was received and used for lawful purposes, why should not the defendant be held liable? The bonds, as stated, were invalid, *as such*, and no suit could be maintained thereon. They were bought, innocently, in the open market, from the duly constituted and recognized agents of the defendant, at the rate named, and the net sum received (eighty-five cents on a dollar) *passed into the city treasury and was disbursed for lawful purposes.* Full and detailed reports of receipts and disbursements concerning the same were made from time to time, and received the sanction of the mayor and city council. There is no doubt that the plaintiff, as to all except two of the bonds, bought them directly from the city's agents, at the rate named, and paid to said agents accordingly. As to the other two bonds, the facts are that they were sold under like circumstances to the respective assignors of the plaintiff, at the same rate, and subsequently bought of said assignors, *bona fide*, for the same price.

It is of the first importance to bear in mind, however, that the city could neither borrow nor expend money except when

authorized by its charter and the law. It cannot set up the fraudulent or unlawful contrivances of its agents, whereby plaintiff's money was procured and used for lawful purposes, as a defence in this action, if the plaintiff or purchaser was not in *pari delicto* as to said wrongful conduct.

As to the bonds bought not directly from defendant's agent, the assignee is subrogated to the rights of the assignor. This has been settled in this circuit (*Shirk* v. *Pulaski County*, 4 Dillon, 209), and if not directly adjudged, at least broadly intimated, by the supreme court of the United States.

The next inquiry is not free from doubt. The fund commissioner was not to sell the bonds for less than eighty-five per cent of their face value. He did pay that sum to the defendant, *five* per cent having been used for commissions and expenses of sale. The city was prohibited from increasing its debt, but was bound to meet its existing indebtedness. To meet that indebtedness and current expenses, including the expenses of negotiating this loan or borrowing the sum needed, the plaintiff's ninety per cent was received. That sum, therefore, was had and lawfully applied, and the defendant must answer therefor. Of course, the plaintiff can receive interest only at the rate of six per cent on the sum so advanced by him or his assignors, from the date when payment of interest ceased.

It is unnecessary to distinguish, more clearly, this case from one where, through the fraudulent acts of a municipal agent, money has been procured by him for unlawful purposes, or through him passed to the municipality for unlawful objects and been so used. The doctrine, not of fraud alone, would, in such a case, have to be considered with reference to the respective parties, but also the doctrine of *ultra vires*.

The case before the court is, in its worst aspects, simply this, to-wit: A procurement through unlawful means of a given sum of money, which was received by the principal and by the latter lawfully used; the lender being innocent that the means used were invalid. A municipality can exercise no powers not conferred upon it, nor can it resort to forbidden means to accom-

plish a prohibited result. It necessarily acts through agents, and it is important that such agents should be restricted in their agency to prescribed modes of action. But suppose they violate such prohibitions, or transcend wilfully the restrictions imposed on them, yet the fruits thereof, being received by them, are applied to the lawful objects of the municipality; and suppose the lender, in ignorance of any fraudulent devices of the kind, parts with his money in good faith, and the municipality has had and used the money so procured for lawful purposes, or still has it in its treasury, shall it refuse to refund the same?

It is not necessary to go into an inquiry in this case as to matters wherein an agent on one side, and the party dealing with him on the other, are *in pari delicto*. Here we have the recognized agents of the city undertaking to raise funds for lawful purposes, and by antedating the bonds raising said funds, giving, as evidence of the money borrowed, bonds which, for statutory reasons, could not be enforced *as bonds*. The purchaser of said bonds, or (what is the same) the lender to the borrowing city, parts with his money, which the city received and lawfully used, although the purchaser or lender received as evidence of what he advanced the bonds on which he could not recover directly; is he, therefore, to lose the money so by him loaned and used by the city? One who deals with a municipality must be sure that it is acting within its corporate powers. If its agents are acting beyond such powers, he deals at his peril.

If the municipality has the power to raise funds for prescribed purposes, but is forbidden to raise them in the manner adopted by its agents, may the innocent lender hold the city liable as for money had and received, notwithstanding the funds came into its possession through prohibited means used by its agents? Here a technical question is encountered. If the lender knows that the means are unlawful (taking cognizance of the law as to said means), shall he have the aid of the court to recover? But if, through the designed fraud of the city's agents, he is innocently misled into the purchase of the bonds, which on their face are outside of the prohibitions of the statute, and

the city receives the avails thereof, and uses such avails in a lawful way, shall he be remediless?

The broad distinction must be recognized between an effort to enable a municipality to exceed the limits fixed to its indebtedness, and a resort to prohibited means to raise funds for a lawful purpose. It was a positive requirement that the obligations of the city should not exceed a specified amount, with exceptions as to past indebtedness. It was also a positive requirement that future bonds should be registered in conformity with the act of March, 1872.

It appears from the evidence that the bonds in question, heretofore pronounced invalid for non-registry, were the means through which plaintiff's money went into the treasury of the city, and was used for lawful purposes; and it appears also that the purchaser of the bonds did not know of the false antedating. The rules invoked concerning the relationship of vendor and vendee in open market, as to municipal bonds, cannot affect this case; for those rules pertain solely to vendors (other than the obligors) and their vendees. The obligor's liability still remains, and depends on considerations entirely distinct from those arising between an ordinary vendor and vendee.

This is a suit as between the obligor of the bond and the assignee thereof. The bond being for statutory reasons void, the assignee is not protected by the law-merchant. The equities of the original transaction are open, and evidence thereon has been had. The assignee being subrogated to all the rights of the first assignor, may recover from the obligor what he (that assignor) actually paid, and no more. He cannot recover on the bond, because that was invalid, and hence not obligatory, but is entitled to a recovery of what the city actually received from the first vendee of the bond. If ninety cents on a dollar were paid, as heretofore stated, that is the amount of the recovery, with six per cent interest on what is due. (Dillon on Municipal Corporations, sec. 730, and notes.)

JUDGMENT ACCORDINGLY.

NOTE. — A writ of error was taken in this case. See *Gause* v. *Clarksville, post.*

AMERICAN MIDDLINGS PURIFIER COMPANY *v.* ATLANTIC MILLING COMPANY (Eastern District of Missouri); SAME *v.* CHRISTIAN (District of Minnesota).

The Cochrane reissued patent, sustained in *Cochrane* v. *Deener* (94 U. S. 780), for the manufacture of new process flour by the purification of "middlings" by screening and blowing, was held void because no such process was described, suggested, or claimed in the original patent.

(*Before* DILLON, TREAT, and NELSON, JJ.)

Cochrane Reissued Patent. — New Process Flour. — Purification of Middlings. — Expansion of Claim in Reissued Patent.

ON the 6th day of January, 1863, letters patent, numbered 37,317, were granted by the United States to William F. Cochrane for "a new and useful method of bolting flour." The claims in this patent were as follows:

"*1st.* Bolting the meal over a series of reels covered with cloths of increasing fineness, in combination with a blast, substantially in the manner described.

"*2d.* Running the offal through the entire series of reels, substantially in the manner described, for the purpose of making the flour bolt more freely.

"*3d.* Rebolting the 'white middlings' flour after regrinding and mixing them with offal, substantially in the manner described.

"*4th.* Conducting the flour made upon each reel into a separate compartment, substantially in the manner described, for the purpose of making a variety of grades, or of mixing them in any proportion desired, as set forth."

On the 24th day of April, 1874, the above-mentioned patent was reissued, numbered 5,841, for "a new and useful improvement in the art of manufacturing flour." The claim in the reissued patent was as follows:

"What I claim as my invention, and desire to secure by letters patent, as an improvement in the art of manufacturing flour, is

the hereinbefore-described process for manufacturing flour from the meal of ground wheat, by first taking out the superfine flour, and then taking out the pulverulent impurities by subjection to the combined operations of screening and blowing, and afterwards regrinding and rebolting the purified middlings."

The complainant is the assignee of the reissued patent.

The reissued patent was sustained by the supreme court, in *Cochrane* v. *Deener* (94 U. S. 780).

A motion was made in the supreme court to vacate that decree, because it was procured by collusion. The charge was not sustained, but in denying the motion the supreme court said: "Under the circumstances, we think that third parties, who had no opportunity of being heard, and whose interests as opposed to the Cochrane patents are very important, should not be concluded from having a further hearing upon it whenever a future case may be presented for our consideration."

The defendants in their respective answers deny the validity of the reissued patent on various grounds, the more important of which are that such reissue is not for the same invention as that described and claimed in the original patent, and that the invention had been anticipated by others, and described in various publications and patents prior to 1863; and the defendants also deny the alleged infringement. Voluminous proofs were taken, accompanied with many diagrams, models, and exhibits. By consent of parties, the arguments were heard by the circuit judge and Judges TREAT and NELSON.

Rodney Mason, Charles F. Blake, C. H. Krum, and others, for the complainant.

George Harding, Gordon E. Cole, F. N. Judson, and others, for the defendants.

DILLON, *Circuit Judge.*—The reissued patent is a process patent for an alleged new and useful improvement in the art of manufacturing flour. "The claim therein," as construed by the

complainant, "is for the use of five consecutive steps performed in the art of manufacturing flour, in a definite order, viz.:

"*1st*, Grinding the wheat into meal;

"*2d*, Taking out the superfine flour;

"*3d*, Taking out the pulverulent impurities by the combined operation of screening and blowing so as to purify the middlings, which are then,

"*4th*, Reground, and then,

"*5th*, Rebolted."

The real value of the invention described and claimed in the reissued patent consists in the purification of the middlings by screening and blowing, thus freeing them from pulverulent impurities, and thereby fitting them to be reground into flour of a superior quality. The mode described in the patent and accompanying model and drawings for effecting the purification of the middlings is by the agency of revolving bolts acting upon the meal or "chop" as sieves or screens, assisted in their operation by blasts of air introduced within them. The claim of the complainant is that wherever, in the manufacture of flour, the wheat is ground by the first operation of the stones into meal, so that superfine flour is by the next step of the process taken therefrom, any purification of the middlings in residual mass (of which the valuable constituent is the middlings) by the combined operation of screening and blowing, intermediately, for the purpose of regrinding and rebolting, whether such purifying is within the flour reels or upon vibratory screens outside of reels, is an infringement of the Cochrane patent.

Flour made from purified middlings is now, and since about the year 1871 or 1872 has been, well known throughout the country as "new process flour."

In what consists the essential value of this "new process?" The answer is, purified middlings—that is, the making of a first grade, and even the best grade, of flour out of middlings—from which it had generally been considered by the millers of this country (although more intelligent or advanced ideas prevailed in France, and perhaps elsewhere in Europe) impossible to pro-

duce, or, at all events, impracticable profitably to produce, flour of the first quality.

A fundamental question in the cause, underlying all others, is: Did Mr. Cochrane, in his original patent, granted January 6th, 1863, contemplate or provide for the purification of middlings by the combined action of the screen and blast? If he did not, the reissue, which must be for the same invention as the original patent, and which makes the basis of its claim such purification of the middlings, is void.

In the light of arguments of great ability and thoroughness, extending over a period of fifteen days, and illustrated at every step by exhibits, diagrams, and models, the judges who sat at the hearing have deliberately considered the question above stated, and have reached a unanimous conclusion upon it.

It becomes my duty to announce the judgment of the court. I shall content myself with stating it, without displaying in detail the reasons, or elaborating the grounds upon which it rests.

The description of the invention in the original patent as a "method of bolting flour;" the progressively finer meshes in the three bolting reels therein described; the absence of any "returns;" the statement therein that the agency of the blast is to "assist the bolting;" the cupola, or dome, on the model, provided with screens, which could have no other effect than to arrest the impurities, or the most of them, and return them directly to the flour; the enforced circuit of air, containing any impurities that might escape the screens in the cupola, and returning the air, under the conditions specified, laden with such impurities, directly into the reels; the absence of any statement in the patent of a purpose to purify middlings; the absence of any claim for purifying middlings; the statement that air is used "to aid bolting," and the obvious consideration that, if air was used to purify middlings, it could not fail to have occurred to so ingenious a mind as Mr. Cochrane's that this could be most easily and most effectually applied as it is now almost universally applied—outside of the reels or bolts, and not within them; the failure to provide for blasts of air in the "separator,"

or in a separator; the low grinding which his process evidently contemplated, as evidenced by the successively finer meshes; the fact now established, that the manufacture of middlings flour is not practised without more or less high grinding, or higher grinding than was ordinarily used in this country—the foregoing considerations, in connection with the extrinsic testimony as to what was done under the patent, all concur to satisfy us that the idea of Mr. Cochrane was the use of the blast in the reels as an aid in the mere process of bolting, with the view of obtaining an increased quantity of choice flour, and not for the production of purified middlings.

The reissued patent having been expanded to embrace a claim for purifying middlings, when no such process was described, suggested, or claimed in the original patent, it is void. If this conclusion is sound, it is not necessary to consider the questions of anticipation or infringement, upon some of which, if compelled to decide them, we might not agree. The result is that the bills must be dismissed, and decrees will be entered accordingly.

TREAT and NELSON, JJ., concur.

NELSON, J.—I concur in the opinion of the circuit judge. The actual invention of Cochrane has been enlarged by the addition of new matter in the reissue, so that, when the two patents are compared, the expansion is apparent. The new patent is not for the same invention secured and embraced in the original letters patent.

TREAT, J.—I concur in the opinion just delivered by the circuit judge. The reissued patent, No. 5,841, is not for the same invention as patent No. 37,317, and is consequently void. In addition to the summary of reasons just announced for the conclusion reached, it seems advisable to state that the original patent was merely for an improved method of bolting in the manner described, whereby an increased quantity of choice flour could be obtained from the ordinary process of milling, without

any reference to purified middlings, by combined blowing and screening in an intermediate or any other stage of the operations.

The original contract of Cochrane, in 1860, with Warder & Barnett, shows that his purpose was, by low grinding, to produce a superior grade of flour in larger quantities than heretofore known. He agreed to make "the most superior grade of flour in the United States out of four bushels and twelve pounds of choice wheat for each barrel of flour," which result could not be accomplished except by low grinding, if at all. His scheme or plan did not contemplate a large amount of middlings, and could not have done so, for the lower the grinding the less the quantity, and, as a general rule, the poorer the quality, of the middlings.

At the time said contract was made, Cochrane had an interest in the Coggswell & McKiernan patent, the devices of which he evidently designed to utilize. His experiments at Lagonda, and subsequently at the first Barnett mill, also show that his purpose was to produce a large amount of such choice flour by low grinding from the least possible, or a comparatively small, quantity of wheat.

The early experiments were directed to that end, and hence the satisfaction evinced when the required amount of flour was produced approximately from the designated amount of wheat. When, however, it was ascertained that no grade of good middlings flour could be thus made, the resort was had to higher grinding, of which, as to the result, Warder & Barnett complained as being one-quarter too much.

They prove by their correspondence at the time, just as the original patent shows, that the inventor supposed that by his process and devices for bolting he could accomplish his purpose by using the ordinary process of milling. This is evident, not only from the correspondence at the time, but from the mechanical inventions to which he referred, and also from the special stress placed on meshes of increasing fineness. In that correspondence there was a constant boast of the new mode of bolting, whereby the meshes were to be kept cool, and free from clog-

ging, etc., and also of the device for returning the current of air through the cupola back into the reels, whence it had just escaped through the perforated pipes, meshes, etc. In one of the letters it was confidently claimed that the difficulties as to low grinding, even of spring wheat, could be overcome by Cochrane's contrivances—that grinding of even that class of wheat could not be so low as to prevent "cleaning up." It was low grinding, then, whereby the large quantity of choice flour was to be made, that the inventor had in view. This was to be effected, not by an "intermediate" stage of purification between the production of superfine flour and the regrinding of middlings, but by the use of meshes of increasing fineness in the flour bolts, assisted by blasts of air. Those blasts of air were to spend their force within the first three reels; for no blasts were to be used in the separator before regrinding. The necessary effect of using successively finer meshes, instead of successively coarser, was to prevent the escape through the meshes of a larger quantity of impurities, and, consequently, of making the flour thus screened clearer and better. The impurities thus prevented from passing through the screens into the flour would necessarily be retained in the reels, and pass off with the tailings, consisting of middlings, shipstuff, etc. It is not to be supposed that meshes of increasing fineness could operate in any other way. Hence the Cochrane process was not to purify the middlings, or increase their quantity or quality, but merely by his "improved method of bolting" to obtain a larger amount of choice flour from the specified quantity of wheat.

In his original patent, No. 37,317, he formulated four claims, not one of which was for purifying middlings, but two were specially directed to his mode of "bolting." He especially stated that the flour screened through each of his first three reels could be kept separate or mixed, as the miller might desire, without a hint that the siftings of the third reel would consist of dirty flour, or pulverulent impurities, not fit to be used, or which it was sought to remove, either from the flour thus sifted through the third reel or from the middlings within that reel, which were to pass off with the tailings.

The devices specified in the original patent are very significant on this point. They provided for the introduction of a blast of air through perforated pipes into each reel, as stated, for the purpose of keeping the meshes open, cooling, etc., without mentioning any effect to be produced towards removing pulverulent impurities, or even naming such impurities. Indeed, if that effect had been contemplated, the invention would not have provided a cupola with two screens and brushes to arrest the escape of whatever was blown or wafted into the cupola, and to cause that wafted matter to be thrown back or discharged directly into the first flour chest. If that wafted matter, whether flour, dust, or pulverulent impurities, was to be thus returned and mixed with the siftings of the first reel, it is evident that the invention had no reference to the removal and separation of such matter from the flour. The devices involved necessarily a contrivance for the escape of the air forced into the reels—for an enforced current of the kind must have an outlet, otherwise disastrous results would follow, or the blasts cease to be operative. The screens in the cupola, and the brushes, for the purpose of returning the arrested particles into the reel-chest, indicate plainly enough that there was no thought of causing pulverulent impurities to escape through the cupola. This is made still more apparent from the fact that whatever escaped through the cupola was, in the normal operation of the connecting tubes, to be blown back into the very reels from which it had been just expelled. It was only in exceptional states of the weather that the valve in the tube was to be opened, but at all other times there was to be a return of the current escaping from the cupola into the reels, carrying with said current whatever it contained. If, then, the purpose was to expel impurities, why such well-arranged devices to force them back into the contents of the reels?

Again, the "cant" ventilator of Coggswell & McKiernan, and their air blasts through zinc jackets, had been used at Lagonda and in the Barnett mill before the original patent, No. 37,317, issued, and simultaneously with that patent Cochrane

had procured for his "cant" ventilator his patent No. 37,321; yet in the specifications and claims of No. 37,317 he omitted, and it must have been *ex industria*, all reference to his No. 37,321, and substituted therefor his cupola, with screens and brushes. When he had ascertained, in 1874, that his devices, as referred to in the original patent, would not purify middlings, nor essentially aid in so doing, he interjected into his specifications for a reissue the rejected device No. 37,321. The testimony sufficiently explains why, from his experimenting at Lagonda and in the first Barnett mill, he discarded the "cant" ventilation, independent of its anticipation by Coggswell & McKiernan. The devices by which the improved method of bolting was to be carried on, so far as air was concerned, looked to an enforced current, or blast, operating from within the reels outward, and not by induced currents operating from without, through the screens, inward or upward, as in flat and vibrating sieves.

Whatever construction may be properly put on the words "combined operations of screening and blowing," it is obvious that the original invention contemplated a blast of air from within the reels, whereby its force should be directed not only through the meal as it was whirled around inside the reels, but also against the meshes of the reels, tending to force through whatever was small enough to pass. If the flour dust was thus forced through and wafted into the cupola, while the heavier particles — small enough to pass — fell by their greater specific gravity into the conveyers, the extremely comminuted particles of the integuments of the wheat berry, or of its cell-walls, would, like the flour dust, pass into the cupola by force of the blast, there to be arrested and brushed back into the flour, or returned through the tube into the reels, to be again and again whirled in and out in a continuous round.

The many changes made by Cochrane, and Warder & Barnett, after the original patent issued, and also after the reissued patent was granted, in order to adjust the devices referred to in No. 37,317 to an induced current or suction, indicate very clearly

that the idea or thought of a process for purifying middlings in an "intermediate" or any other stage of the manufacture, by the combined operations of blowing and screening, was not originally in the mind of the inventor. The testimony is clear that when the Cochrane device or machine was rearranged and altered so as to work by suction, the perforated pipes performed no function. The manner of inducing or drawing the air into the reel-chests by suction, and the operation of the reel-screens when suction was used, were the reverse of combined blowing and screening. It cannot be fairly said, in the light of facts and circumstances now in evidence, that those reverse modes of operating were substantially the same, or immaterial changes as to form or modes of accomplishing what the patent covered. Even after the reissue, No. 5,841, Cochrane and Warder & Barnett had to resort to important changes as to the modes of introducing air into their reel-chests; they abandoned the device of a cupola with screens and brushes, introduced practically a new tube and valve, left their perforated pipes functionless, and changed blasts into suctions, or enforced into induced currents. In brief, the essential changes in Cochrane's devices, as described in No. 37,317, which he was compelled to make in order that a beneficial result might follow, so far as purifying middlings went, demonstrate that a process for purifying middlings and making therefrom a high grade of flour, superior to superfine, was not thought of by him in or before 1863.

But where can there be detected in No. 37,317 a suggestion either of a mode of purifying middlings by the combined operations of blowing and screening, or of an "intermediate" stage therefor between the production of superfine flour and the regrinding of the middlings? Where is or was such an "intermediate" stage? It is contended that the screenings by the first reel were superfine flour, or, if not, perhaps the screenings also of a part or whole of the second reel, and, consequently, the combined operations of blowing and screening in the third reel purified the middlings at that stage which was intermediate the production of superfine flour and the regrinding of the middlings.

But we have endeavored to show that the screenings of the third reel were flour, which could be mixed with the flour from the first two reels, and that the patent so states. If, then, by meshes of increasing fineness, the middlings discharged at the tail of the third reel were less free from impurities than they would be if coarser meshes were used, the process of purification could not occur by the use of that reel, nor at that stage of the operations. There is suggested in the original patent neither the idea of purifying the middlings at the intermediate stage mentioned, nor the use of the combined operations of screening and blowing for that specific purpose. It cannot be said that the mention of "white middlings" embodies such a conception, so that the reissue, without expansion, could cover the purification of middlings in the manner and at the stage claimed, for the term "white middlings" was well known to the art of milling long before, and also to the commercial world. The manner in which "white middlings" are referred to in the patent shows that the term was used as one well known, and not as a new or special product of any superior value.

A comparison of the original and reissued patents, and an examination of Cochrane's contract with Warder & Barnett in 1860, also of the correspondence of the latter and of the testimony concerning low and high grinding in connection with Cochrane's invention, will show that the purpose was as stated, viz., by the ordinary process of milling, through his method of bolting, to increase the yield of choice flour. He soon learned that higher grinding, or what Professor Horsford's report terms "half-high milling," was necessary to the production of the best quality of flour, or of that superior grade which he contracted to make. Instead of accomplishing the promised result by low grinding from four bushels and twelve pounds of wheat, higher grinding was soon resorted to, requiring five bushels and twenty pounds of wheat per barrel. He complained to his millers, it is said, that they persisted in grinding too low, although that mode of grinding was necessary to make the required yield, and insisted that they should grind higher. It was well known in the

art that high grinding made a better quality but less quantity of good flour, but Cochrane thought he could increase the quantity of choice flour by his process. Warder & Barnett, it seems, following, it may be, the suggestion of Cochrane, began the use of high grinding at an early day, and stated to their correspondents that certain shipments made were from grinding "high," yet, in one of their letters, they then boasted that by the new method even spring wheat could not be ground "too low" to prevent its being "cleared up." The ordinary process of milling, in connection with which Cochrane's method of bolting was to be employed, must have been, if not low grinding, certainly not the high grinding used in defendant's mill; for the value of his method looked to the greater yield of choice flour.

The reissue says: "It is this intermediate treatment (between the separation of the superfine flour and the completion of the middlings flour by regrinding and rebolting) for the separation and removal of the pulverulent impurities which distinguishes my improvement in the art from all before known modes of manufacture." In the original patent there is not only no such claim, but nothing is said about the removal of pulverulent or any other impurities, or any such intermediate treatment. A brief use of air in an expanded portion of one reel at Lagonda, operating as a separator, was soon abandoned in the course of the early experimenting, and, hence, in the original patent no use of air in the separator was mentioned.

The proof is that, in the modern or present mode of purifying middlings, the purification occurs in connection with what answers to Cochrane's separator; and in that connection a current of air is now employed, while Cochrane did not call for any blast of air at that stage of the process, and previous to regrinding. His plan or process was not to use blasts of air in connection with the separator, but to rely on the ordinary process of screening, without the use of air blasts or currents. The reissue attempts to expand the original invention to cover, therefore, in connection with the separator, what he did not originally claim or suggest, in order that he might appropriate to him-

self what had been since discovered or used outside of his invention.

As the conclusion is reached that the reissued patent is void, it is unnecessary to consider whether the process claimed was anticipated in any of the various publications, or by any of the persons or processes as set up by defendants. The questions concerning "high milling," the French and economical processes as used in Europe, the connection of the Cabanes and other patents with such processes, and also of Gove's method and machine, would, if fully considered, involve a very elaborate investigation of details, and require, for a clear presentation of their analysis, resort to numerous drawings and models.

If the reissue had been held valid, an embarrassing and delicate question would have arisen concerning the alleged infringement by the defendant. In the case of *Cochrane* v. *Deener*, the United States supreme court decided that the Welsh patent was an infringement of Cochrane's. That court had before it not only the process patent of Cochrane, but also his patents for machines; and to what extent this court, under the circumstances, should venture to enter upon the subject anew — if an investigation as to that point were needed — might be doubtful. But, if an appeal is taken, that court will have before it in this suit the large amount of new evidence introduced, in the light of which it can determine for itself whether it will review its former opinion or not. Were it necessary for a decision on that point to be now made, and were it open for our consideration, we might possibly reach a different conclusion.

DECREE ACCORDINGLY.

NOTE. — Questions growing out of this patent, see 4 Dillon, pp. 100, 448.

Re GOODWIN, BEHR, & Co., Bankrupts—VALLEY NATIONAL BANK, Claimant.

1. An accommodation maker of a note is not, as respects a holder with notice, the principal debtor; and where the holder, with knowledge that the maker is an accommodation maker, without his knowledge or consent gives time, by a valid contract, to the party who is in fact the principal debtor, the accommodation debtor is entitled to the rights of a surety, and is discharged, although the holder did not know, when he took the note, that the maker was not the party primarily liable thereon.
2. Such is the modern English doctrine, and it was followed in the case in judgment.

(*Before* DILLON, *Circuit Judge.*)

Accommodation Maker entitled to Rights of a Surety as against a Holder with knowledge of the True Relation of such Maker.

APPEAL in bankruptcy. The district court, on the motion of the assignee, expunged the claim of the Valley National Bank on the note for $6,000 held by it, made by Goodwin, Behr, & Co., bankrupts, to the order of Gustavus Hœber, and by him endorsed to the bank for value. The bank appeals from this order. The further facts appear in the following opinion of the district court:

TREAT, J.—A motion was made by the assignee to expunge the claim of the bank. Issues have been framed, and the cause heard. Goodwin, Behr, & Co. were the makers, and Hœber the endorser, of a note for $6,000, which the bank discounted. Before the same became due the bank *knew* that the makers were such solely for the *accommodation* of the endorser. The bank then discounted a note of said endorser at ninety days for $5,000, passed the proceeds of the discount to his private account which he kept with said bank, and he gave his check for $6,000, which was charged against said private account. As the endorser's note for $5,000 was not secured by an endorser thereon, the bank retained the original note for $6,000, and seek to have the same allowed against Goodwin, Behr, & Co.'s

estate in bankruptcy. There are two propositions, either of which is fatal to the claim:

1st. Hœber, the endorser, paid the note by his check for the $6,000, which extinguished the bank's demand thereon.

2d. If that be not so, the bank, knowing that Hœber was primarily liable (Goodwin, Behr, & Co. being mere accommodation makers), received payment of at least $1,000 thereon from Hœber, and extended to him the time of payment for the balance for ninety days without the assent of the accommodation makers.

The legal rule in such cases is that if the holder of the note is informed that the maker is only nominally such, but actually an accommodation maker for the endorser, he must deal with the paper and the parties with reference to their true relationships to the obligation. The makers were sureties, and an extension of time to Hœber, the actual principal, without the assent of the surety, was a discharge of the surety if the bank precluded itself from enforcing at once the original obligation. It is true that matters have been called to the attention of the court which show peculiar equities as between Goodwin, Behr, & Co. and Hœber, but the bank does not represent said equities. The authorities are not seemingly in accord. If, however, the bank is held, by information given subsequent to the discount of the $6,000 note, to be dealing with the transaction as if Hœber were the maker, and Goodwin, Behr, & Co. the endorsers, then the receipt of part payment from Hœber, and an extension of time to him for a consideration as to the balance due, discharged the sureties. The English courts, while insisting on the strict rule as to the extension of time to the principal without assent of the surety, criticise the reasons given in some cases in support of the rule. May it not be that the true reason is found in the maxim, "*in haec foedera non veni*" (I have not entered into this agreement)? A surety enters into an obligation, the elements of which are time, etc. If the obligation is to be prolonged beyond the prescribed time, whereby there can be no legal remedy in his behalf until the end of the new period, is

there not virtually an effort to hold him bound to a changed or new contract as to time, when the financial and other conditions of the parties may have undergone an entire change in the interval? The conclusion is, that the bank is not entitled to prove the $6,000 note, or any part thereof, against the estate of Goodwin, Behr, & Co., and judgment will be entered accordingly.

H. A. Haeussler and *Finklenburg & Rassieur*, for the bank.

Nathaniel Myers, for the assignee in bankruptcy.

DILLON, *Circuit Judge.*—In England an accommodation maker is, in *courts of law*, regarded as the principal debtor, although the creditor or holder knew, at the time of taking the note, that it was given by the maker to the payee without consideration (Byles on Bills [4th ed.], 191, where the cases are cited; 1 Parsons on Notes and Bills, 325, and notes; 3 Kent, 104; Story on Bills, secs. 291, 368, 432, 434); and, therefore, the extension of time by the holder to the acceptor without the consent of the payee and endorser will not discharge the acceptor—nothing will discharge the maker but payment or release. The leading case is *Fentum* v. *Pocock* (5 Taunt. 192, 1 Marsh. 14), which has been frequently approved in England and in this country. The cases are referred to by Mr. Parsons (1 Notes and Bills, 325), and in White & Tudor's Leading Cases in Equity (vol. 2, 4th Am. ed. p. 1917). There is no decision of the exact point by the supreme court of the United States. The nearest approach to it is in *Sprigg* v. *Bank of Mt. Pleasant* (12 Pet. 257), *Lenox* v. *Prout* (3 Wheat. 520), and *Creath* v. *Sims* (5 How. 192, 206). The American cases rest on the authority of the English cases—particularly *Fentum* v. *Pocock*, and those which follow it.

But in *equity* it is otherwise, and the real relation of the parties to the note, bill, or bond determines their rights in all cases where the holder has knowledge of that relation. And it has recently been expressly decided by the queen's bench, the

court of chancery, and by the house of lords, that the rule of law that if the creditor contracts with the principal debtor to give him time, the surety is discharged, applies to bills of exchange and promissory notes; and that it makes no difference, in the application of the rule, that at the time of contracting the debt the surety was believed by the creditor to be the principal debtor. (*Overend, Guerney, & Co.* v. *Oriental Financial Corporation*, Law Rep. 7 Ch. 142, A. D. 1871 [s. c. Law Jour. N. S. vol. 41, Eq. 332], affirmed in the house of lords, Law Rep. 7 H. L. 348, 1874; *Ervin* v. *Lancaster*, 118 Eng. C. L. [6 Best & S.] 571; *Bailey* v. *Edwards*, 116 *Ib.* [4 Best & S.] 761; *Pooley* v. *Harradine*, 90 *Ib.* [7 El. & Bl.] 431; *Taylor* v. *Burgess*, 5 Hurl. & N. 1; *Greenough* v. *McClelland*, 105 Eng. C. L. [2 El. & El.] 424.)

The facts in the English case first cited are, in all essential respects, similar to the case now under consideration, and the principle involved is precisely identical. The accommodation acceptors were held to be sureties as against a holder who did not know that they were accommodation acceptors at the time he discounted the bills, but who, *after knowledge* of that fact, gave time, by a valid contract, to the party who was in fact the principal debtor, without the knowledge or consent of the accommodation acceptors; and the holder's action at law against the acceptors was restrained.

I will not enter upon a lengthened discussion of the subject. These cases settle the law of England, and overrule the cases on which the American decisions to the contrary rest. I am inclined to think the doctrine of the court of chancery, and of the house of lords, rests upon sound principles, and that a creditor who actually knows that a given party is a surety on the contract ought not to be permitted to change that contract, or vary the surety's rights by a new contract, without his consent—unless, indeed, the surety has, by express stipulation, as in *Sprigg* v. *Bank*, *supra*, declared in the contract that he is a principal, and thereby estopped himself to plead and show that he was such, and entitled to the privileges and rights of a surety.

I affirm the decision of the district court on the strength of the recent English cases referred to, and regret that the case is such that my judgment cannot be reviewed by the supreme court.

AFFIRMED.

NOTE.—The following is extracted from the printed argument of Mr. Myers:

1. While mere indulgence to a principal debtor does not release a surety, yet the surety is released if, without his consent, time is given to the principal by any contract binding on the creditor. This proposition is affirmed in all the authorities bearing on any phase of the question.

2. And where, on the maturity of the original obligation, a portion thereof is paid and a new note of the principal debtor taken for the balance, the original obligation being left as collateral security to the new one, that is an extension of time to the principal, which would preclude the creditor from pursuing the principal till the maturity of the new note, and so would release the surety. (*Gould et al.* v. *Robson et al.* 8 East, 576; *Andrews* v. *Marrett*, 58 Me. 540; *Fellows* v. *Prentiss*, 3 Den. 512; *Stedman* v. *Gooch*, 1 Esp. N. P. 3; *Putnam* v. *Lewis*, 8 Johns. Cas. 389; 1 Parsons on Notes and Bills, p. 239.)

3. And it is immaterial that the surety is the maker of the note. If the maker is in fact an accommodation maker, then, as between him and the principal, he is only surety for the principal; and if this relation between the parties is known to the creditor when he first acquires the claim, the foregoing doctrines apply with full force. (*Bank* v. *Woodward*, 5 N. H. 160; *Horne* v. *Bodwell*, 5 Gray, 457; *Wilson* v. *Green et al.* 25 Vt. 456; *Mariner's Bank* v. *Abbott*, 28 Me. 285; *Fowler* v. *Brooks*, 13 N. H. 245; *Claremont Bank* v. *Wood et al.* 10 Vt. 582; *Peake* v. *Estate, etc.* 25 Vt. 31; *Davis* v. *Barrington*, 30 N. H. 524; *Bank of Steubenville* v. *Hoge et al.* 6 Ohio, 18; *Garrett et al.* v. *Ferguson, admr.* 9 Mo. 125; *Jones* v. *Jeffries*, 17 Mo. 577; *Burke et al.* v. *Cruger et al.* 8 Texas, 66; *Smith* v. *Tunno*, 1 McCord, 451; *Lime Rock Bank* v. *Mallett*, 42 Me. 349; *Riley* v. *Gregg*, 16 Wis. 671; *Harris* v. *Brooks*, 21 Pick. 195; *Carpenter* v. *King*, 9 Metc. [Mass.] 511; *Branch Bank* v. *James*, 9 Ala. 949; *Grafton* v. *Kent*, 4 N. H. 221; *Flynn, extr. etc.* v. *Mudd et al.* 27 Ill. 323; *Kennedy et al. extrs.* v. *Evans*, 31 Ill. 269; *Kelly* v. *Gillaspie*, 12 Iowa, 57; *Miller* v. *McCan*, 7 Paige, 451; *Manchester Iron Manufacturing Co.* v. *Sweating*, 10 Wend. 163; and authorities cited in the principal case.)

There are a few cases to the contrary: *Walker* v. *Bank of Montgomery*, 12 Serg. & R. 382; *Bull* v. *Allen*, 19 Conn. 105; *Yates* v. *Donaldson*, 5 Md. 401; *Lewis* v. *Hinchman*, 2 Barr, 418. These four cases are squarely in conflict with the principal case. So far as they consider the question at all, they proceed on the theory that one who signs as maker

is estopped from showing he is only a surety, because that, it is said, would be to contradict the note. But the fact is, a maker of a note is not necessarily a principal. There are thousands of accommodation notes; and for a maker to show he is only an accommodation maker is not to contradict the note, but to show a fact entirely consistent with his being a maker, and, hence, the principle of estoppel does not apply. If, however, the surety, besides being a maker of the note, contracts expressly as principal, then, of course, he has waived his rights and privileges as surety; and this is all that was held in *Sprigg* v. *Bank of Mt. Pleasant* (10 Pet. 257), *McMillan* v. *Parkell* (64 Mo. 286), and *Claremont Bank* v. *Wood et al.* (10 Vt. 585). In the last-mentioned case the note read, "We, each as principal," etc. The court said: "The plaintiff would have been bound to respect the rights of Judd (the maker) as a surety, had these words been omitted."

In *Sprigg* v. *Bank of Mt. Pleasant*, *supra*, the bond described all the obligors as "principals." In *McMillan* v. *Parkell*, *supra*, the note read, "We, each as principal," etc., and also had this clause: "Nor shall any delay or extension of time of demand of payment affect our liability hereon."

The history of the question in England is as follows: The earliest case is *Laxton* v. *Peat* (2 Camp. 185), decided by ELLENBOROUGH in 1809. That decision supports the principal case. In 1813, *Fentum* v. *Pocock* (5 Taunt. 192) came before MANSFIELD, and he overruled *Laxton* v. *Peat*. In 1831, TENTERDEN, in *Hull* v. *Wilcox* (1 Moo. & R. 58), overruled *Fentum* v. *Pocock*, and reaffirmed *Laxton* v. *Peat*. In 1836, *Oakeley* v. *Pasheler*, *supra*, arose in the house of lords. The decision supports the principal case. In 1853, *Manley* v. *Boycott* (2 El. & Bl. 46) reaffirmed *Fentum* v. *Pocock*, but the decision of the house of lords in *Oakeley* v. *Pasheler* was overlooked. Since then the following English decisions support the principal case: *Davis* v. *Stainbank* (6 De G. M. & G. 679), decided in 1854; *Pooley* v. *Harradine* (7 El. & Bl. 431), decided in 1857; *Greenough* v. *McClelland* (2 El. & El. 424), decided in 1860; and, lastly, *Overend, Guerney, & Co.* v. *Oriental Financial Corporation* (Law Rep. 5 Ch. 142), decided in 1871.

4. Nor is the rule altered by the fact that the creditor, at the time he acquired the note, did not know that the maker was only a surety, provided he learned that fact before he granted the extension of time to the principal. (*Overend, Guerney, & Co.* v. *Oriental Financial Corporation*, *supra*; *Oakeley* v. *Pasheler*, *supra*; *Wheat* v. *Kendall*, 6 N. H. 504; *Branch Bank* v. *James et al.* 9 Ala. 949; *Millerd et al.* v. *Thorn*, 56 N. Y. 402; *Smith* v. *Shelden*, 35 Mich. 42.)

Oakeley v. *Pasheler* is about the strongest case in England. In that case, a certain banking firm was indebted to Oakeley in a very large sum. One of the firm died, and his executors gave Oakeley a bond for

the payment of the debt. Subsequently an arrangement was made between the surviving partners and the executors, whereby the surviving partners assumed all the firm debts, including that to Oakeley. From that moment, and only from then, the executors became, as between them and the surviving partners, mere sureties for the debt due Oakeley. Oakeley learned of this arrangement, and then granted an extension to the surviving partners. This was held to release the executors. Lord LYNDHURST said: "The question appears to me to be very clear and distinct, and unembarrassed."

In *Overend, Guerney, & Co.* v. *Oriental Financial Corporation*, Lord Chancellor CAIRNS says that, after *Oakeley* v. *Pasheler*, "it is impossible to contend if, after a right of action accrues to a creditor against two or more persons, he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under these circumstances the rule as to the discharge of the surety does not apply."

The doctrine of *Oakeley* v. *Pasheler* is approved in *Millerd et al.* v. *Thorn* and *Smith* v. *Shelden*, the latter of which is a well-considered opinion by COOLEY, C. J.

Re IVES & PORTER.

1. Where the record of the bankruptcy court on its face shows that the court had jurisdiction to pass a decree adjudicating the debtor to be a bankrupt, and that such a decree was passed, it is conclusive as to the jurisdiction of the bankruptcy court, unless assailed in a *direct* proceeding to set aside or annul the same.
2. While such a decree remains in force, the bankrupt's discharge cannot be opposed on the ground that the facts stated in the petition of the debtor to be adjudicated a bankrupt, as to the length of his residence within the district, are not true.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act. — Jurisdiction of the District Court in Bankruptcy. — Residence. — Conclusiveness of Decree of Adjudication of Bankruptcy. — Discharge.

IVES & PORTER, the bankrupts, filed a voluntary petition in bankruptcy in the district court for this district, on November 1st, 1877, and on the 10th day of the same month were ad-

judged to be bankrupts. The petition was in due form, and contained all the necessary allegations to show the jurisdiction of the court, and that the petitioners were entitled to be adjudicated bankrupts. An assignee was appointed, and the estate of the bankrupts administered in the usual way. Among the creditors, one Harvey Bates proved a claim in bankruptcy. Everything proceeded in the ordinary course, and on June 25th, 1878, the bankrupts filed their petition to be discharged, and the matter came on for hearing before the register, and, no objection being made, the register reported that they were entitled to their discharge. After the report was made the court allowed Mr. Bates to file his objections to the discharge. On the 2d day of August, 1878, Mr. Bates filed his objections, containing four specifications; the fourth specification being to the effect that the court had no jurisdiction to grant a discharge, because the bankrupts had not resided in the eastern district of Missouri for six months next preceding November 1st, 1877, nor for the longest period during said six months, but only acquired a residence in said district on September 15th, 1877, prior to which they had resided in Indiana.

The bankrupts, reserving objections, answered, denying all of the specifications, and alleging that they were *bona fide* residents of this district for the six months immediately preceding the filing of the petition in bankruptcy. The matter was heard upon the proofs, and the court, on September 9th, 1878, overruled the first three specifications and sustained the fourth, and thereupon "Ordered that the discharge of the bankrupts herein be refused, and that the petition for adjudication heretofore filed by the bankrupts herein, together with all proceedings had thereunder, be and the same are hereby dismissed at the costs of the bankrupts."

To review this order the present bill of review is filed.

J. La Due and *William R. Walker*, for the bankrupts.

John D. Davis, for the objecting creditor, Harvey Bates.

DILLON, *Circuit Judge.*—The decision made by the district court is supported in two opinions of an able and experienced bankruptcy judge (*Re Little*, 2 Nat. Bankr. Reg. 294, BLATCHFORD, J.; *Re Leighton*, 5 *Ib.* 96, decided by the same judge). A contrary opinion was given by another very learned judge (*Re Burke*, 3 Nat. Bankr. Reg. 296, DEADY, J.)

The question is one of considerable importance, doubtless, and I have considered it with some care; but inasmuch as the bankrupt act is now repealed, I shall dispose of it without extended argument in support of my conclusion.

The district court not only has bankruptcy jurisdiction, but is the only court of original jurisdiction in bankruptcy. The petition filed in that court by the bankrupts was in due form in every respect, and set forth *all the facts as to residence* and otherwise necessary to state a case within the jurisdiction of the court. An adjudication of bankruptcy on this petition was duly passed and entered. An assignee was appointed, a deed of assignment was executed, debts were proved, meetings of creditors held, and the estate administered. In due course, after the lapse of several months, the bankrupts applied for a discharge, whereupon one of the creditors, who had before proved a claim, appeared and opposed the discharge, on the ground that the court had no jurisdiction to grant it, by reason of the existence of a fact *en pais*, viz., want of residence in the district for the requisite length of time before the filing of the petition in bankruptcy.

It is my judgment that the effect of a decree of adjudication cannot be thus overcome. This objection is not among those specified in the act as grounds of opposing the discharge. (Rev. Stats. secs. 5110, 5111.) The principle decided in *Michaels* v. *Post* (21 Wall. 398, s. c. 12 Nat. Bankr. Reg. 152), and in *Sloan* v. *Lewis* (22 Wall. 150, s. c. 12 Nat. Bankr. Reg. 173), is inconsistent with the right to attack the decree of adjudication in this manner. "Such a decree," says the supreme court in the case first cited, "is in the nature of a decree *in rem* as respects the *status* of the party, and in case the court rendering it has jurisdiction [a case within whose jurisdiction was shown by the peti-

tion filed therein], it is only assailable by a direct proceeding in a competent court, if due notice was given and the adjudication was correct in form." So in the case of *Sloan* v. *Lewis*, where the record of the bankruptcy court showed on its face jurisdiction, it was held that the adjudication of bankruptcy was conclusive in a collateral action. "Where the record [of the bankruptcy court] shows jurisdiction," says the chief justice, "an adjudication of bankruptcy can only be assailed by a *direct* proceeding in a competent court" (22 Wall. 157). An instance of such a direct proceeding is presented in *Re Goodfellow* (LOWELL, J., 3 Nat. Bankr. Reg. 452). The decree adjudging the debtors to be bankrupt was never attacked in the district court. No petition or other direct proceeding to set the same aside was ever made. It is not attacked in the objections filed by Mr. Bates to the discharge of the bankrupts. It remains to this present time unassailed and unreversed. The estate of the bankrupts has been administered under it.

It seems to me to be against the general principles of the law relating to the effect of judgments and decrees of courts, and without any support in the special provisions of the bankrupt act, to allow a judgment, and especially such a judgment as a decree of adjudication in bankruptcy, to be overthrown, and all that has been done under it held to be void, in a proceeding in which the decree is not directly attacked, and where the question only arises incidentally on the application of the bankrupts for their discharge.

The decisions in the district courts referred to, holding a contrary view, were made before the decisions of the supreme court above cited, and are inconsistent with them, unless it can be held that the opposition to a discharge on this ground is a *direct* attack upon the decree adjudging the debtors to be bankrupt—a position I cannot admit to be sound.

The order of the district court dismissing the petition for adjudication is reversed, and the court ordered to overrule the fourth specification in opposition to the discharge, and to grant the discharge of the bankrupts.

ORDERED ACCORDINGLY.

NOTE. — Subsequently an application was made by the counsel for the objecting creditor to modify the order directing the district court to grant a discharge, and reserve the right to the objecting creditor to file a petition for a review of the order of the district court overruling the first three specifications in opposition to the discharge. In disposing of this application the circuit judge remarked:

"I have considered the application in this court by Mr. Davis on behalf of Mr. Harvey Bates, a creditor of Ives & Porter, to modify the decree or judgment rendered in this court on the petition for review, on the 27th ultimo. Briefly, the case is this: Ives & Porter filed a petition to be adjudged voluntary bankrupts, and were so adjudged. Mr. Bates, among others, filed a claim against the estate in bankruptcy, and proved the same. The proceedings took the usual course; an assignee was appointed, and the estate was administered in bankruptcy, and in due time the bankrupts filed their application to be discharged. Mr. Bates appeared and contested that application, and filed four specifications in objection thereto. Three of these specifications were among those enumerated in the bankrupt act as proper to be filed, and the fourth was that the district court had no jurisdiction to grant a discharge, for the reason that the bankrupts had not resided in this district the longest period of the six months next preceding the filing of their petition in bankruptcy. Issues were made and proofs taken in respect of all the matters — the four specifications in opposition to the discharge — and the matter came on for a hearing on the merits. The district court overruled the first three specifications, but sustained the fourth, and dismissed the proceedings in bankruptcy. The bankrupts filed a petition for review, and on the hearing of that I held that it was not competent, by way of objecting to a discharge, to impeach the judgment of the court under the petition in bankruptcy adjudicating the debtors to be bankrupts; that such a judgment was like any other judgment of a court of competent jurisdiction, and could only be impeached by a direct proceeding, and therefore reversed the order of the district court dismissing the proceedings, and ordered to be entered here a judgment directing the district court to grant the discharge. The record before me shows that the bankrupts took exception to the action of the district court in respect to the fourth specification, and all the testimony relating to that subject, to-wit, their residence, is preserved in the record. The district court denied, on the merits, the three other objections. This record does not disclose that any exception was taken or objection made to the action of the district court in that behalf. In the meanwhile the bankrupt act was repealed; and in the meanwhile several months have elapsed. Now the objecting creditor says: 'I want a modification of the decree of this court by which the district court was ordered to grant the discharge, so as to allow me to

file a petition for review of the action of the district court in respect to the three specifications which it denied.'

"It was stated before me on the hearing that the petitioning creditor had no bill of exceptions; but it was expected — if this order was modified — to go into the district court and get a bill, so as to enable the action of the district court to be reviewed on that subject; and, further, that he was willing to submit the matter on the testimony and record as it is, when he had that exception. The whole spirit and tenor of the bankrupt act looks to a speedy closing of estates. If this was an appeal from a judgment or decree for money against the objecting creditor's claim which had been wholly denied by the district court, he could only have that action reviewed if he took an appeal within ten days. Now he comes in where the time is not specifically limited as in appeal — although in many courts they have a rule that it shall be filed within ten days — and wants, after the lapse of several months, the right reserved to file a petition to review the action of the district court as to matters to which he took no exception at the time.

"I think, under the circumstances, I ought to deny that, as he had a full hearing. Let the order stand as it was made.

"ORDERED ACCORDINGLY."

FLINT *v.* RUSSELL.

1. A livery stable in the residence portion of a city is not, as a matter of law, necessarily to be considered as a nuisance to the improved property adjoining or near it.
2. Where the facts stated in the bill showing that the erection and use of a livery stable would be a nuisance to the adjoining property were denied by the answer, a preliminary injunction to restrain the erection of a building to be used as a livery stable was refused.

(*Before* DILLON, *Circuit Judge.*)

Nuisance. — Livery Stable in City. — Injunction against Threatened Nuisances.

ON MOTION for an injunction.

The bill alleges, in substance, that the parties are owners of adjacent premises, in block 1,014, between Ewing and Garrison avenues, on Locust street, in the city of St. Louis — the prem-

ises of complainant being occupied solely for residence purposes, and those of the defendants having been acquired by them only recently, for the purpose of the erection thereon of a public livery and sale stable. It is alleged that the property fronting on Locust street, for many blocks east and west of the defendants' property, is occupied and used for residence purposes, and that it has been, to that end, handsomely and expensively improved—there being no erection upon the street within the boundaries indicated which are, or have been, used for business or manufactures. It is alleged that, well knowing the established character of the neighborhood, and its occupation and use for residence purposes, the defendants, having bought the property adjoining that of complainant, have announced their intention to erect thereon a public livery stable; that in such stable will be kept great numbers of horses and vehicles; that there will be stored in it, for purposes of feed, large quantities of hay and other combustible materials; that the presence of so many horses in such a stable will cause great noise, the generation of offensive odors, the congregation of swarms of flies, and will attract numbers of improper and disreputable characters; and that, by reason of the said matters, the value of complainant's premises will be irreparably damaged, they will be rendered unfit for residence purposes, and the dwelling which stands thereon will be rendered untenantable by complainant, or any one who might otherwise be desirous to occupy the same. It is alleged that the livery stable of defendants is to be constructed with board floors, and that the stamping of horses thereon, and the rolling of vehicles on the same, by reason of the close proximity of the stable to the dwelling of complainant, will cause any occupant great and interminable annoyance, uneasiness, and disquiet, and render it impossible for any person or family to occupy said dwelling without great physical discomfort and inconvenience, and that the presence of combustible materials so near the said dwelling will cause every occupant of said dwelling grave fears and anxiety by reason of the increased danger and peril from fire.

It is alleged, also, that the mere beginning of the stable has

greatly diminished the value of complainant's property, and that he is advised that the maintenance of such stable will be prejudicial to the health of the residents within its immediate neighborhood.

It is alleged, further, that the eastern wall of defendants' stable will be built so as to immediately cover the western wall of complainant's dwelling, and will be extended to the sidewalk on the north, so as to cut off the light and view westward from complainant's said premises, and that defendants have actually begun the erection of their building, and announce their purpose to complete the same.

As a further ground of relief, the bill alleges that the defendants have begun the erection of their building, and will complete the same, for unlawful purposes of extortion and blackmail, and that they have purchased the lot now occupied by them with the expectation that, upon their announcement of their intention to build a livery stable, or upon the completion of the same, the property owners in the immediate neighborhood will be compelled, from motives of self-protection, to unite and buy the defendants' lot at a price to be fixed by defendants, greatly in excess of what they paid and of the real value of said premises. It is alleged, furthermore, that in other neighborhoods devoted to residences the defendants have bought property, and, having announced their intention to build a public livery stable, and having begun the same, have been bought off by the property owners of the neighborhood, at an exorbitant advance over and above the price paid for the property by the defendants; and that, even in the present instance, the defendants have indicated that what they might ultimately do would depend upon the action of the owners of the property in the neighborhood.

The bill alleges that the defendants have been notified to desist from the erection thus begun by them, but that they persist in continuing the work already begun.

The bill prays an injunction and general relief. In support of the bill, the complainant has filed numerous affidavits.

The defendants answer, under oath, in which they admit the

ownership, as alleged, of lots in block 1,014, on Locust street; that the defendants are erecting a brick building thereon, adjoining the plaintiff's property, to be used as a livery and boarding, but not, as alleged, a sale stable; deny that the complainant is in actual possession of the adjoining building, but only in possession by his tenant; deny that the neighborhood is fixed in its character as a residence neighborhood, and set forth various trades that are carried on in said block 1,014—among them, on Olive street, a large livery stable, two meat shops, and other shops; deny that the building they are constructing will be a nuisance, or that the business to be carried on therein will in any way constitute a nuisance, and they put in issue every averment to that effect in the bill. They aver that they have purchased and paid for the land occupied by them in good faith; that they have employed an architect, who stands well in his profession, to design the building in such a manner that defendants shall reside in the second story, and so as to suppress all noises and be free from all nuisances averred in the bill. They aver, further, that Thomas P. Russell, for thirty years previous to March, 1878, carried on the business continuously in the same building on Franklin avenue, in a residence portion of the city. Their change from that place was occasioned by the expiration of his lease; that his son was admitted as a partner some years previous to 1878. They aver that they bought and paid for the ground now owned by them with the intention of pursuing their trade in a lawful and proper manner, and that they propose only to enjoy the lawful use and control of their own land, and in no manner to interfere with the rights of others; that the said livery stable, when constructed, will not be a nuisance, nor carried on in any way so as to interfere with the complainant, and they will carry it on in a proper and lawful manner; that their business, when so conducted, is an useful and necessary calling, and they deny all the imputations in the bill against their good faith. Numerous affidavits were filed in support of the answer.

J. M. & C. H. Krum, for the complainant.

Broadhead, Slayback, & Haeussler, for the defendants.

DILLON, *Circuit Judge.*—The prayer of the bill is, "that the defendants be perpetually enjoined by the decree of the court from further proceeding with the erection of said livery stable upon the said lot, and from the use and occupation of said premises for the purposes of a public livery stable, and for general relief." The present application is for a special preliminary injunction restraining the defendants from making such erection, and from so using the said premises.

The questions which may finally be involved in the merits of the case are of very great importance, as they arise out of the point where two plain principles of law meet. The one is that every owner of private property may make any lawful use of it which he sees proper. The other is that private property must be so used as not to injure the property of his neighbor, or invade the just rights of the public. (*Tipping* v. *St. Helen's Smelting Co.* Law Rep. 11 H. L. 642.)

The essential groundwork of the bill in this case is, that the proposed erection of a livery stable on the lot in question, and its use for this purpose when erected, will constitute a nuisance to the plaintiff's adjoining property. The bill can have no other foundation. On a street, and in a locality such as this portion of Locust street is, many erections can readily be imagined that would be extremely objectionable to the owners of residences, such as a meat market, a green-grocer's establishment, or, indeed, a store building or a business house of any kind. But the general law of the land does not limit the rights of ownership by the tastes and wishes of one's neighbors. Possibly, under the charter provisions, the municipal authorities might be invested with more power, in the nature of police regulations, over the uses to which private property may be put, than can be exercised by the courts under the general law; but it is conceded that the city authorities have not undertaken to regulate the erection or use of livery stables. It is, therefore, clear that this application must rest upon the proposition that the livery stable proposed to be erected and used by the defendants is, and will be, in the legal sense of the term, a *nuisance*. To be a nuisance it

must be something which unreasonably and sensibly interferes with the comfort and enjoyment of life or property—which may be by noises, noxious and offensive smells, injurious gases, the collection of flies and insects, and the like. The books abound in cases where nuisances of this kind are held actionable at law, and where, when the fact is ascertained, either by a verdict or by admission in the pleadings, or from the essential and unavoidable character of the trade or occupation, that the thing or matter complained of is a nuisance, courts of equity have interfered by injunction.

Counsel have referred to a number of adjudications in which the legal rights of the proprietors of livery stables and those of the adjoining or near proprietors have been considered by the courts. The principal cases are the following: *Aldrich* v. *Howard*, 7 R. I. 87, s. c. 8 *Ib.* 246; *Burditt* v. *Swenson*, 17 Texas, 489; *Dargan* v. *Waddell*, 9 Ired. Law, 244; *Kirkman* v. *Handy*, 11 Humph. 406; *Coker* v. *Birge*, 10 Ga. 336; *Harrison* v. *Brooks*, 20 *Ib.* 537; *Morris* v. *Brower*, 1 Anth. 368. The judgments in these cases concur in establishing this doctrine, viz., that a livery stable in a town or city is not *per se*—that is, necessarily and unavoidably—a nuisance, but it may be or become a nuisance, and this depends upon its location, as respects the property near by, and the manner in which it is built, kept, and used. The foregoing observations are well illustrated by *Aldrich* v. *Howard* (8 R. I. 246), where it was decided that a livery stable may be a nuisance, notwithstanding it was properly built, properly kept, and was in a location as fit as any in that part of the city. The court say: "It has been held, in other cases, that a stable in a town is not necessarily and *per se* a nuisance; yet if it is so built or so used as that it destroys the comfort of persons owning and occupying adjoining premises, creating such an annoyance as to render life uncomfortable, then it is none the less a nuisance that it is well kept, carefully built, and as favorably located as the town will admit."

This principle, that a livery stable is or is not a nuisance according to circumstances, is decisive of the present application

for a preliminary injunction. The stable is not yet erected—its erection has just been commenced. The complainant seeks relief by injunction against an apprehended mischief and nuisance. The principles upon which the courts of equity proceed in such cases are well settled, and are thus clearly stated by Lord Chancellor BROUGHAM in the case of the *Earl of Ripon* v. *Hobart* (3 Myl. & K. 169, 179): "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceedings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question." I consider the principles thus laid down as to the time or stage at which equity will interfere as founded on the soundest of reasons; and they have been approved by the supreme court of Tennessee in *Kirkman* v. *Handy, supra*, which refused to prevent the erection of a livery stable upon a lot adjoining the plaintiff's, "on Cherry street, in one of the best neighborhoods in the city of Nashville." In *Coker* v. *Birge* (9 Ga. 425), an injunction against the erection was granted, but it was for the reason that, no answer having been filed, the allegations of the bill that the stable would be a nuisance were admitted; but when this was denied, the same court, in the subsequent case of *Harrison* v. *Brooks*, refused such an injunction. In *Burditt* v. *Swenson, supra*, the livery stable having been found to be a nuisance by the verdict of a jury, the court awarded a perpetual injunction.

No case has been referred to in which the erection of a livery stable has been enjoined where the fact that it would be a nuisance was denied, and where it had not been ascertained to be such by an appropriate judicial inquiry, before the injunction

was awarded. And, so far as my researches have gone, Lord BROUGHAM is entirely correct in his statement in the *Earl of Ripon's Case, supra*, "that no instance can be produced of the interposition by injunction in the case of an eventual or contingent nuisance." (*Cleveland* v. *Gas Co.* 20 N. J. Eq. 201; *Duncan* v. *Hayes*, 22 *Ib.* 25; *Rhodes* v. *Dunbar*, 57 Pa. St. 274; Wood on Nuisances, sec. 789.) The difficulty in thus interfering is greatly increased, if not insurmountable, when it is the use to which the structure is to be put, and not the intrinsic nature of the structure itself, which forms the basis of anticipated grievance. (*Duncan* v. *Hayes*, 22 N. J. Eq. 25.)

That the parties may not be misled, it may be well to add that we deny the injunction on the ground that the answer having denied the fact that the building, when erected and used as proposed, will be a nuisance to the property in the neighborhood, and the case being one in which the question of nuisance or no nuisance depends upon circumstances hereafter to be ascertained, it is, therefore, not one in which it is proper to issue the writ asked at this stage of the controversy. The filing of the bill may not, however, prove to be eventually useless, since "it is generally good policy," says Mr. Wood (Law of Nuisances, sec. 790), where there are strong reasons to believe that the thing will be a nuisance, to institute proceedings to stay its progress, particularly if its erection involves large expenditures, as in such cases the party cannot be charged with *laches*, nor can acquiescence in any measure be imputed to him, and the diligence used by instituting the proceedings, operating as a notice and protest against the use of the property in the manner contemplated, strengthens the plaintiff's equities when he asks for an injunction after the use of the property actually proves injurious." The defendants now proceed at their peril, and if it shall hereafter be found by a jury, or otherwise judicially ascertained, that the stable in this place, as used by them, does interfere with the comfortable enjoyment of the neighboring property, they cannot complain if they are then perpetually enjoined from the further use of it for the purpose for which it was designed.

INJUNCTION DENIED.

WILLIAM J. LEWIS *v.* JOSEPH B. KINNEY.

1. In case of a dispute between part owners of a steamboat as to her employment, a court of admiralty will not decree a sale of the whole boat at the instance of the minority interest.
2. Nature of the stipulation which the majority interest, wishing to employ the boat, may be required to give for the protection of the minority interest, discussed.

(*Before* DILLON, *Circuit Judge.*)

Part Owners of Steamboats.— Compulsory Sale as a Means of Partition.— Stipulation to Return.

APPEAL in admiralty. The libellant, William J. Lewis, on the 27th day of June, 1878, filed his libel in the district court of the United States for this district against the steamboat R. W. Dugan, her engines, etc., and Joseph B. Kinney, part owner, etc., in which he alleged the following facts: That about the 17th day of March, 1876, he, said libellant, purchased from said Kinney, the then sole owner, a third part of said steamboat, and that from said date of purchase until about November of the same year, by agreement of himself and co-owner, she was run in the "Missouri river trade," between St. Louis and Portland, Missouri; that about the last-named date said Kinney, in opposition to the expressed wishes of libellant, took the steamboat to New Orleans, Louisiana, and ran her, at a loss, in the "New Orleans and Red river trade," and afterwards took her to New Orleans, and, being in good condition, instead of loading her with a profitable cargo, caused her to be towed to St. Louis by the Kate Kinney—another steamboat belonging to said Kinney—at an expense to the owners of the R. W. Dugan of $600; that upon the arrival of the vessel at St. Louis, libellant objected to the course taken by his said co-owner, and requested that an account of the "boat's business" be rendered to him, which said Kinney failed and refused to do; that about April 1st, 1877, said Kinney, despite the repeated objections of libellant, took the steamboat R. W. Dugan to the Yellowstone river, and for more than

a year used her as a tender for said steamer Kate Kinney in fulfilling a contract for the transportation of goods entered into by him individually with the government of the United States, and upon his return to St. Louis, in May, 1878, although requested, failed and refused to render any account to libellant of the business or earnings of the boat; that said Kinney, against the wishes and consent of libellant, has incurred large expenses for unnecessary repairs to the vessel, and refuses to permit libellant to have any voice in the use and management of the same. Libellant further alleges that he has repeatedly offered to sell his interest in the steamboat to said Kinney at a reasonable price, or to purchase his share on like terms, or to run the vessel in a trade and under a master to be agreed upon, all of which offers said Kinney has declined. In view of these facts, and of the disputes between himself and co-owner being irreconcilable, he prays for a decree for the sale of the steamboat and proper distribution of the proceeds.

The said Kinney appeared as claimant of two-thirds part of the steamboat R. W. Dugan, and filed a "plea to the jurisdiction" of the court in the nature of a demurrer, on the general ground that no case is stated in the libel entitling the libellant to a decree for the sale of the vessel, and on the special ground that the owner of a minority interest is not entitled to such decree. The district court sustained the plea and dismissed the libel. Against this decree the libellant appeals and seeks to have the same reversed.

Given Campbell, for the libellant (appellant).

William H. H. Russell, for the respondent (appellee).

DILLON, *Circuit Judge*. — The libellant is the owner of one-third, the claimant of two-thirds, of the steamboat. The object of the libel is to obtain a decree for the sale of the boat and a division of the proceeds. The district court decided that the case stated in the libel did not entitle the libellant to a decree for a sale. The libellant is doubtless entitled, on an application for

that purpose, to require a stipulation from the respondent, if the latter insists on employing the vessel in voyages or upon ventures against the judgment and remonstrance of the libellant, to return the vessel, or in default to pay the value of the libellant's interest therein. As the respondent is the owner of the larger interest, he has, according to the settled doctrine on the subject, the preferable right to the use of the vessel, on giving, if required by the libellant, the proper stipulation. If the respondent refuses or declines to employ the boat, the libellant, although the owner of the lesser interest, on giving such a stipulation, would be entitled to the possession of the vessel for the purpose of employing her. This much is clearly stated in the opinion of the supreme court in *The Steamboat Orleans* v. *Phœbus* (11 Pet. 175). As I understand that case, it also settles, so far as this court is concerned, the question as to the libellant's right, on the facts stated in the libel, to a decree for a sale. In that case the owner of a one-sixth part in a steamboat asked the admiralty to decree a sale against the owners of the other five-sixths parts, alleging, to support his claim, that, as master and part owner, he had been dispossessed by the co-owners, who were navigating the boat contrary to his wishes; that they refused to have an amicable sale of the boat, and that, likewise against his wishes, they were about to send the boat on another trip up the Mississippi river. The question was made that the district court had no jurisdiction as a court of admiralty to entertain the libel. Mr. Justice STORY, delivering the judgment of the court, disposed of this point in the following sentence: "The jurisdiction of courts of admiralty, in cases of part owners having unequal interests and shares, is not and never has been applied to direct a sale upon any dispute between them as to the trade and navigation of a ship engaged in maritime voyages, properly so called." It seems to have been assumed that no more favorable rule applied to steamboats, for he adds: "If, therefore, this was a vessel engaged in maritime navigation, the libel for a sale could not be maintained."

The statement in the present libel that the respondent is using

the boat in voyages and in trades against the wish of the libellant, is identical with that made in the case before the supreme court. The respondent as part owner has the legal right to use the vessel, subject to giving a stipulation, if required. The fraudulent expenses incurred by the respondent would not be binding on the libellant. If the respondent is under a liability to account to the libellant in respect to the use or operation of said boat, the proper court will compel him to do so. As I cannot but regard the judgment of the supreme court in the case cited as conclusive in the present libel, I do not deem it necessary to go into the learning applicable to the question presented. It will be found summarized in Story on Partnership, sections 415–439; Parsons on Partnership, 558–563; Smith's Mercantile Law, 184–187; Abbott on Shipping, part 1, chapter 3, p. 98 *et seq.;* Freeman on Cotenancy and Partition, sections 389–392. The general doctrine of the maritime law, as well as the decisions in Great Britain and in this country, are stated in *Tunno* v. *The Betsina* (5 Am. Law Reg. [O. S.] 406), which also holds that the owner of a minority interest has no right to a decree for a sale of the vessel against the wishes of the majority.

It would be extremely difficult to formulate rules for the adjustment of the relations of part owners of a vessel when discord arises between them, which would always be just in their operation. The majority may oppressively and unjustly use their conceded preferable right to employ the vessel. The minority owner may be cross-grained and unreasonable. Public policy requires that the vessel shall be employed and not suffered to lie idle, if any of the owners will use her. Neither the major nor minor interest should be armed with a club to hold *in terrorem* over the other. To allow the owner of a small fraction of the vessel to demand a sale as of right, would give him an undue advantage. To allow the majority to force a sale of his interest at pleasure, would put him too much in their power. The unreasonable refusal of the minor share-owner to unite with the majority interests in employing the vessel may be a hardship upon them by requiring more than their share of capital for equipment and outfit.

This consideration does not, however, have the same force with respect to western steamboats as in the case of sea-going vessels. The majority, because of their preferable right to the use of the vessel, and their right to prevent a sale, and, also, to use the vessel without compensation, if such right exists, have an inducement to act unfairly towards the minority. The only relief to the latter, if unfairly dealt by, would be to have a sale of the vessel or to get some more beneficial stipulation than a mere engagement to return the vessel. But a right to a sale at all is denied by the English courts. Equity has refused to decree a sale of a *vessel*, as it may do between part owners in respect to other indivisible chattels, but turned the parties over to the admiralty; and it is denied that the admiralty courts in England can ever decree a sale. In this country the practice is not to decree a sale except where the dispute is between the owners of equal shares, and there is, therefore, no other possible way of terminating it.

These considerations show the necessity for, as well as the difficulty of, settling the disputes which arise among part owners. What tribunal would be so competent to do this on broad and equitable principles as the admiralty courts, if they could exercise the comprehensive and flexible powers which are acknowledged to belong to the court of equity, and which ought equally to pertain to the admiralty?

I cannot say, therefore, that I am quite satisfied with the uncertain or limited protection which the English and American cases give to the minority interest, especially if the doctrines there maintained are applied without modification to steamboats on our western rivers. If, in case of irreconcilable hostility between part owners, the only right of the owner of the minority interest under any circumstances is to require a stipulation simply for a return of the steamboat, he is almost wholly in the power of the majority.

The average life of a western steamer is very short, probably not exceeding eight or ten years, and if the majority interest, having the preferable right to all of the boat, can prevent a compulsory sale under any circumstances, and can also use the boat

as long as it wishes by simply giving a stipulation for its safe return, this course may be pursued until the boat is worn out. The subject is full of difficulties, as Lord TENTERDEN and others have pointed out (Abbott on Shipping, 98; *The Margaret*, 2 Hag. Adm. 275, per Sir CHRISTOPHER ROBINSON; *The Marengo*, 1 Lowell's Decisions, 52, per LOWELL, J.); but many cases may easily be supposed, and doubtless are constantly arising, in which it would be more equitable to the minority, and neither unjust to the majority nor incompatible with the interests of commerce and the policy of the law which favors the employment of the vessel, if the court, in its discretion, guided by the circumstances of the particular case, could, instead of the usual stipulation for a return of the boat, require a stipulation for an ascertained reasonable compensation for the value of the use of the minority interest, the owner of the latter interest in such case to be his own insurer. The power of the court to require such a stipulation is doubtful (*The Apollo*, 1 Hag. Adm. 306, 312; *The Marengo*, *supra*), and I do not decide it or even intimate an opinion upon it; but that such a power ought to exist in respect of boats navigating our western rivers, however it may be in respect of sea-going vessels, would seem to be easy of demonstration. The libel, as acted on by the district court, presented only the question as to the right of the libellant, upon the facts therein stated, to a decree for a sale, and, for the reasons above given, my judgment is that its decree dismissing the libel was right, and the same is accordingly affirmed.

AFFIRMED.

WILLIAM R. GAUSE *v.* CITY OF CLARKSVILLE.

1. Whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the state applicable to it.
2. It has no incidental or inherent authority under the usual grants of municipal powers as a means of discharging its ordinary municipal functions. Such authority may be inferred from special and extraordinary powers, which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when, upon the whole legislation applicable to the municipality, such appears to have been the legislative intent.
3. These principles applied, and coupon bonds to borrow money to erect and repair wharves and to open streets, issued under the general grants of municipal power in the charter, were held not to be binding upon the city, while other bonds, issued under a special act of the legislature, in payment of stock in companies organized to construct macadamized roads from the city, were held to be valid.
4. Where bonds of a city are issued without authority for money borrowed and actually received by the city, the remedy against the city is not by an action on the bonds, but to recover the money.

(*Before* DILLON and TREAT, JJ.)

Municipal Corporations.—Power to Borrow Money.—Power to Issue Commercial Paper.

ON DEMURRER to counts 1 to 10 and 12 to 17 of the amended petition. All of the counts in the petition state, for causes of action, the making by defendant of divers negotiable bonds, payable to bearer, and all acquired by plaintiff after maturity. All of them allege the defendant to be a corporation, incorporated (1) June 7th, 1847, under the general law of 1845 as to the incorporation of towns (Rev. Stats. of 1845, p. 552), and (2) on February 24th, 1853, under a special act, approved that day, entitled, "An act to incorporate the town of Clarksville" (Acts 1853, p. 591).

Counts 1 and 2 allege that the bonds therein named were made "for money borrowed by defendant for the purpose of

erecting and repairing wharves in the corporate limits of its city, and for otherwise improving said city." Said bonds are respectively for $2,000 and $1,000—together $3,000.

Counts 3 to 10 allege that the bonds named in them were made "for money borrowed by defendant for the purpose of opening, clearing, graduating, paving, and improving divers streets and alleys in said city, and of otherwise improving said city." Said bonds are respectively for $1,000, $1,000, $1,500, $400, $400, $200, $1,000, and $500—total, $6,000.

The bond named in count 1 reads thus:

"*$2,000.* *Wharf Improvement Bond.* *No. 1.*

"CITY OF CLARKSVILLE, MO., Sept. 1st, 1864.

"Ten years after date the city of Clarksville, in the state of Missouri, promises to pay to William C. Prewitt, or bearer, at the treasury of said city of Clarksville, the sum of two thousand dollars, with interest at eight per cent per annum, payable annually on the first day of September in each year, upon the presentation of the coupon hereunto annexed, until the said principal sum is fully paid, without defalcation, for value received.

"In testimony whereof, in pursuance of ordinance No. 106 of said city, I, E. B. Carroll, mayor of said city, have hereto set my hand and caused the corporate seal of said city to be affixed, and the clerk of the city council to attest the same, at the city aforesaid, this first day of September, A. D. 1864.

[SEAL.] "E. B. CARROLL, *Mayor.*

"Attest: J. A. MANNS, *Clerk City Council.*

"Countersigned: JOHN M. CLIFFORD, *City Treasurer.*"

The bonds named in counts 2 and 10 are substantially the same in form as this, except as to caption, dates, names, and amounts, and are headed "street improvement bonds."

All of the counts allege payment by defendant of interest on the bonds during all the time they were running, and until after maturity—that is, for from six to twelve years.

While they do not allege anything as to the use made by the city of the money borrowed on them, yet the counsel for the

plaintiff states the fact to be that it was in each instance used for the purposes for which it is alleged to have been borrowed, and plaintiff—if it be deemed by the court to be material to his cause of action—will, with leave, so state the facts by amendment. He contended, however, that no such averment is necessary.

The sole question raised by the demurrer to these counts is whether defendant had power to borrow money for the purposes alleged, and to give the bonds in suit for such money.

The provisions of the charter in respect of these bonds sufficiently appear in the opinion of the court. The defendant's population is stated to be between one and two thousand.

As to counts 12 to 17, on "road improvement bonds:" The allegations of these counts show that the bonds declared on therein were given for money borrowed to pay other bonds previously given in payment of subscriptions made by defendant to stock in certain companies organized to build gravel roads from Clarksville to other points in Missouri. The bonds, in form, are substantially the same as those named in counts 1 to 10, except as to names of the payees, dates, and amounts. The interest is alleged to have been paid on them during the whole time they ran, and until after maturity.

The act which is alleged as the authority for the subscriptions by defendant to the stock of said road companies and the issue of the bonds is found in session acts of 1857, page 302, and reads thus:

"SEC. 1. The city council are hereby authorized and empowered to levy, assess, and collect a direct tax on all real estate within the city limits, not to exceed two per cent per annum, for the purpose of aiding in the construction of macadamized or other roads leading from Clarksville to any other point in the state; and, for the purpose of securing the building of such roads, they may cause subscriptions of stock to be made by the city to any company now organized, or which may hereafter be organized, to construct such roads.

"SEC. 2. All dividends that may be declared to the city of

Clarksville by any such company, upon stock paid in from the special tax authorized by the 1st section of this act, shall be by the city council paid over to the real estate owners paying the tax, in proportion to the amount of tax respectively paid by them."

The question raised by the demurrer to these counts is whether the city had the power, under this act, to issue bonds in payment of stock subscribed by it, and, when they became due, to issue other bonds for money borrowed to pay them.

Dryden & Dryden and *Enoch Pepper*, for the plaintiff.

Wagner, Dyer, & Emmons, for the defendant.

DILLON, *Circuit Judge.*—We are of opinion that the act of 1845 (Rev. Stats. of 1845, p. 552) was superseded by the special act of February 24th, 1853 (Acts 1853, p. 591), incorporating the defendant city.

Three classes of bonds are in question, headed and styled respectively, "wharf improvement bonds," "street improvement bonds," and "road improvement bonds." The first two stand on the same, the last on a different, ground. The former will be first considered. The bonds purport to be unconditional obligations of the city, and are negotiable in form. They do not recite the purpose for which they were issued; this purpose only appears, if at all, from the heading.

The charter of the city (section 13) gives the city council power "to erect, repair, and regulate wharves," and "to open, clear, regulate, graduate, or improve the streets of the city." Section 1 creates the city a corporation, and provides that it shall have power to contract and to sue and be sued, etc., and "may grant, lease, purchase, receive, and hold property, real, personal, and mixed, and may do all other acts as natural persons; and may have a common seal, and alter and break the same at pleasure."

Section 12 gives to the council general power to levy taxes on property in the city, but limits such taxes to a rate of one-fourth of one per cent.

As to the "wharf improvement bonds," the petition alleges that they were made for "money borrowed by defendant for the purpose of erecting and repairing wharves in the corporate limits of its city, and for otherwise improving said city." These bonds are respectively for $2,000 and $1,000—together $3,000.

As to the "street improvement bonds," it is alleged in the petition that they were executed "for money borrowed by the defendant for the purpose of opening, clearing, graduating, paving, and improving divers streets and alleys in said city, and of otherwise improving said city." These bonds are respectively for $1,000, $1,000, $1,500, $400, $400, $200, $1,000, and $500—total, $6,000.

The demurrer to the petition upon the foregoing classes of bonds is upon the ground that the defendant had no power to borrow money for the purposes alleged, or to execute the bonds.

The questions to be decided are, therefore, two: 1st. Had the city power to borrow money for the purposes alleged? 2d. If so, whether it had the power to execute negotiable bonds therefor.

The charter contains no express power to do either, unless it is conferred by the clause in section 1 above quoted, that the city "may do all other acts as natural persons." This general language must necessarily be restrained to such other acts as are authorized by its charter or the statutes of the state applicable to the city, if any, and cannot be construed to remove all the limitations inseparable from corporate existence, and to confer upon the city authority to engage in business of a private nature, or to make its powers commensurate with those of natural persons. It is not, therefore, an express power to borrow money or to issue commercial paper. No such powers are in terms conferred. If they exist, they exist as incidental to the express powers to erect and repair wharves, and to open and improve streets, and not otherwise.

As the power to borrow money and the power to issue negotiable paper are, though closely related, not identical, they will be to some extent separately considered. And, first, as to the

power to borrow money: As the case stands, it is to be taken that the money evidenced by the bonds now under consideration was borrowed in advance of any debt incurred in respect of the wharves or streets, and as a means of raising by their sale in the market a fund to pay for contemplated improvements of that character.

The general question as to the implied power of municipal corporations to borrow money and to execute negotiable securities therefor has been recently much examined. The American cases on the subject are conflicting, and it is impossible to harmonize them. A careful examination of them, however, has left us with the conviction that the questions here involved are not only open to discussion, but remain yet to be judicially settled. The unsettled state of the law, concurring with the great importance of the question, has induced us to examine it with care, and must be our justification for discussing the subject with more than ordinary fulness.

The following cases favor the existence of the incidental powers here in question: *Bank* v. *Chillicothe*, 7 Ohio, part 2, p. 21, 1836; *Mills* v. *Gleason*, 11 Wis. 470; *Williamsport* v. *Commonwealth*, 84 Pa. St. 487 (three judges dissenting); *Clarke* v. *School District*, 3 R. I. 169; *Sheffield Township* v. *Andress*, 56 Ind. 157. And see cases collected in notes to sections 82 and 407, Dillon on Municipal Corporations.

The following cases are opposed to the existence of such powers: *Hackettstown* v. *Swackhamer*, 37 N. J. Law, 191; *Knapp* v. *Hoboken*, *Ib.* 394; *Beaman* v. *Leake County* (power of counties), 42 Miss. 237; *Police Jury* v. *Britton* (power of counties), 15 Wall. 566, 572; opinion of BRADLEY, J., in *Nashville* v. *Ray*, 19 Wall. 468.

It is not proposed to examine and review these cases separately. In the existing uncertainty of the law on the subject, it is better, perhaps, to discuss the questions upon principle, rather than to place our judgment respecting them upon one class of the conflicting decisions.

Corporations in this country can exist only by virtue of legis-

lative enactment, and it necessarily follows that whether they possess the power to borrow money or to make negotiable paper depends upon a true construction of their charters and the legislation applicable to them. This is true of all corporations, private as well as municipal.

An examination of the judicial judgments in England and in this country shows considerable diversity of opinion between the English and American courts as to the extent of the implied powers of corporations. The English courts have at all times wisely set a strong face against an elastic construction of corporate charters. The American courts have too often favored the existence of constructive powers.

In England, if a private corporation wishes power to borrow money, the power and the purposes for which, and the conditions on which, it may be exercised, are expressed in the charter or constituent acts, or in the memorandum and articles of association; and the power is not held to exist unless the charter or articles of association confer it, or unless the nature of the business for which the corporation is chartered or organized raises a necessary or reasonable implication of its existence.

But in this country it must be admitted that the courts have held, quite without exception, that all corporations for pecuniary profit, unless specially restrained, may not only borrow money, but issue negotiable paper for any corporate debt. (Dillon on Municipal Corporations, secs. 82, 407, and cases cited in notes; *Lucas* v. *Pitney*, 3 Dutch. 221; *Hackettstown* v. *Swackhamer*, 37 N. J. Law, 191, per BEASLEY, C. J.)

The original of our municipal institutions are derived from England, and it is the unquestionable law of that country that municipal corporations have no power to borrow money unless conferred by statute. (*Regina* v. *Litchfield*, 4 Ad. & El. [N. S.] 891, 906.) In the case just cited it was held that there could be no recovery upon the note of the corporation given for money borrowed and used to pay the debts of the corporation. PATTESON, J., without saying that the lender was absolutely remediless in any form of action or suit, did say that he had no

remedy upon the note, because this is "not a trading corporation."

In this country municipal corporations are by statute invested with certain defined powers, and they are almost wholly dependent upon revenues derived from the authority given to levy taxes for the means of executing their municipal functions.

In the case before us the defendant city had, *inter alia*, the usual power to erect and repair wharves and to improve streets, and to make contracts and to incur debts therefor. It had the power to levy taxes to raise the means to pay debts thus created. The amount of taxes authorized to be laid in any one year was limited. It is entirely practicable for the city to execute its ordinary municipal powers, and discharge its ordinary municipal duties, without resorting to borrowing money. If, in erecting wharves or improving streets, it incurs a general debt, it seems to us plainly to have been the intention of the legislature, as shown by the charter, that it should be paid out of its ordinary revenue. It is not necessary to resort to the perilous expedient of borrowing money in advance, which may be lost, embezzled, or misappropriated; much less to borrow it on a long credit, which inevitably leads to abuse and extravagance, and issue therefor, as the means of obtaining it, its negotiable securities. There is an obvious and essential difference in incurring a debt to be paid in the usual manner, out of the ordinary revenues of the corporation derived from taxation, and the raising of money in advance by a pledge of credit and the issue of coupon bonds, payable at a long-distant day, for sale in the money markets of the country.

What are the consequences of holding that there is, under these circumstances, an implied power to borrow money in this manner and for this purpose? The temptation to extravagance and the danger of loss have been already mentioned, and the history of the workings of our municipal institutions shows that this temptation always operates to their injury, and that burdensome debts and oppressive taxation are its natural and almost inevitable results. But this is not all. Legal consequences of a

serious nature follow from the doctrine that there is an incidental power to borrow money to execute the ordinary powers of the municipality. If the power thus to borrow exists, it is without legal limits. Its only possible limit is the credit of the corporation — the amount of bonds its officers can sell. Nor is this all. If the power to borrow money exists, then, under the view of the courts as almost universally held in this country, the power to borrow implies the further power to give, like any other borrower, a note, bill, or bond, negotiable in form and effect, for the sum borrowed; the time of payment and the discount to be such as may be agreed upon between the corporation and the proposed lender. The bonds may, as in the recent case of the city of Williamsport, be issued for an enormous amount, and be sold, as in that instance, for sixty-seven per cent of their par value, or even less, and the corporation is bound. (*Williamsport* v. *Commonwealth*, 84 Pa. St. 487.) Nor is this all. The supreme court of the United States has firmly established the doctrine, by a long series of well-known decisions upon municipal bonds, "that when a corporation has power, under any circumstances, to issue negotiable securities, the *bona fide* holder has the right to presume that they were issued under the circumstances which gave the requisite authority, and they are no more to be impeached in the hands of such a holder than any other commercial paper." (*Lexington* v. *Butler*, 14 Wall. 282.)

Such are the mischievous and alarming consequences of the unsound doctrine that a municipality has, by virtue of its ordinary powers, and merely as a means of executing its ordinary duties, the power to pledge its credit by the issue and sale of its commercial obligations. It is not the law. No such doctrine can permanently stand. Although it has taken as yet no deep root in our jurisprudence, it has nevertheless attained sufficient development to show its noxious character. The general, and, until a period comparatively recent, the universal, practice of municipalities not to issue, without express legislative authority, bonds or commercial obligations as a means of raising loans, demonstrates the non-existence of an implied power to do this

by demonstrating that no such power is necessary to enable a municipality to execute its usual powers and to discharge its ordinary duties.

We are required in this case only to determine the inherent or incidental power of the city to raise loans by a sale of its negotiable securities, payable at a distant day. We deny any such power. Whether all borrowing to meet debts actually incurred under an arrangement which contemplates repayment out of the regular revenue, and for which a mere voucher or certificate of indebtedness is issued, is *ultra vires* unless the authority is expressly given, we need not now decide. What we decide on this point is that the power to erect wharves and to improve streets, conferred by the defendant's charter, does not carry with it the power to raise funds for this purpose by the issue and sale of negotiable securities like those here in suit.

Whatever doubt may be considered to exist as to the implied right to borrow, the want of authority in a municipal corporation, as merely incidental to its usual municipal powers, to issue negotiable securities which shall be invested with all the attributes of commercial paper, seems, on reason and principle, to be plain. Commercial paper had its origin in the conveniences or necessities of trade among merchants. Originally only merchants made such paper; afterwards the making of it was extended to all persons acting in their individual capacity. It extends to trading, commercial, and other partnerships; but if the partnership is not a trading partnership, "the question," says Mr. Lindley, "whether one partner has implied authority to bind his copartners by putting the name of the firm to a negotiable instrument depends upon whether the business of the partnership is such that dealings in negotiable instruments are necessary for its transaction, or are usual in partnerships of the same description." (1 Lindley on Partnership [Eng. ed.], 213, 214.)

As to the power of corporations to issue commercial paper, the law of England is settled. In England no corporation, whether municipal (*Regina* v. *Litchfield*, 4 Ad. & El. [N. S.]

891, 906) or private (*Bateman* v. *Mid-Wales Railway Co.* Law Rep. 1 C. P. 499, A. D. 1866), has the incidental right to make commercial paper, except the Bank of England, which was incorporated for the very purpose, and trading corporations strictly, such as the East India Company. We state the foregoing propositions after a careful examination of the English books. Accordingly it is laid down by Mr. Justice BYLES, in his work on bills, that, "without special authority, expressed or implied, a corporation has no power to make, endorse, or accept bills or notes" (Byles on Bills [8th Eng. ed.], 62). Thus, a water-works company (*Broughton* v. *Manchester Water-Works*, 3 Barn. & Ald. 1), a gas joint stock company (*Bramah* v. *Roberts*, 3 Bing. N. C. 963), or even trading companies, unless such a power is essential to the purposes for which they are formed (*Bateman* v. *Railway Co. supra*), have no general or implied authority to make commercial paper. In *Bateman's Case*, just cited, the question for the first time arose in England, as late as 1866, as to the right of a railway company, with an authorized capital of £170,000, to make or accept bills of exchange, and it was unanimously decided, by judges of great eminence (ERLE, C. J., BYLES, KEATING, and MONTAGUE SMITH, JJ.), that the company had no such power. The acceptance was under seal, and it is a mistake to suppose that the decision rested on the technical ground that a corporation can only contract under seal. It was placed upon the broad ground that there was no act of parliament, general or special, which conferred the power. It was admitted by all the judges that the railway company might incur debts in the construction or operation of the road; "but it is one thing," says KEATING, J., "to say that they shall be liable to be sued for goods sold and delivered or for work done, and an entirely different thing to say that they may accept bills in payment." And to the same effect was the opinion of the other judges.

The principle of this case was approved in the *Peruvian, etc. Railway Co.* v. *Thames, etc. Insurance Co.* (Law Rep. 2 Ch. 617), when a general incidental power to issue bills of exchange

and negotiable instruments under the companies act of 1862 was denied, and the power held to depend upon the proper construction of the memorandum and articles of association. The companies organized under that act may communicate this power to their directors, but it must be given expressly or by fair intendment in the memorandum and articles of association of the company, or it will not exist.

We are aware that the American courts, as to private corporations organized for pecuniary profit, have very generally held a different doctrine, and affirmed their implied or incidental power to make commercial paper (Dillon on Municipal Corporations, secs. 81, 82, 407, and cases cited). But the powers of private corporations in this regard are not here material.

The American judgments which have affirmed the like power in municipal corporations have done so upon this course of reasoning: The corporation, they argue, has power to contract a debt, and it is assumed to be incident to that power to give a note or bill or bond in payment of it. Thus, in *Kelly* v. *Brooklyn*, 4 Hill (N. Y.), 263, COWEN, J., makes the basis of the judgment the erroneous proposition that, independent of any statute provision, all corporations, private and municipal, may issue negotiable paper for a debt contracted in the course of its business; and other courts have, without examination, adopted this mistaken view of the law. (*Galena* v. *Corinth*, 48 Ill. 423; *Clarke* v. *School District*, 3 R. I. 199; *Sheffield* v. *Andress*, 56 Ind. 157; *Tucker* v. *Raleigh*, 75 N. C. 267; *Ketchum* v. *Buffalo*, 14 N. Y. 356; *Douglas* v. *Virginia City*, 5 Nev. 147; *Sturtevants* v. *Alton*, 3 McLean, 393.)

It sufficiently appears from the foregoing that it is a mistake to affirm that the power to issue negotiable paper necessarily or legally results from the corporate power to create debts.

In England, as shown by *Bateman's Case, supra*, it is held that, inasmuch as the corporation has no power to accept bills, it cannot be made liable on its acceptance, though the bill was drawn for a valid and binding debt.

On this point ERLE, C. J., says: "The bill of exchange is a

cause of action—a contract by itself—which binds the acceptor in the hands of an endorsee for value; and I conceive it would be altogether contrary to the principles of the law which regulates such instruments that they should be valid or not according as the consideration between the original parties was good or bad, or whether, in the case of a corporation, the consideration in respect of which the acceptance is given is sufficiently connected with the purpose for which the acceptors are incorporated. It would be inconvenient to the last degree if such an inquiry could be gone into. Some bills might be given for a consideration which was valid, as for work done for the company, and others as a security for money obtained on loans beyond their borrowing powers. It would be a pernicious thing to hold that, in respect of the former, the corporation might be sued by an endorsee, but in respect of the latter not."

Whether we consider the question in the light of the nature and objects of the ordinary grants of municipal power, or in the light of the purposes which led to the invention and which sustain the use of negotiable paper with the qualities attributed to it by the law-merchant, we are alike led to the conclusion that the mere power to create a municipal liability for ordinary municipal purposes does not carry with it as an incident the authority to raise loans by the issue and sale of commercial obligations. The implied power to issue vouchers or evidences of indebtedness for authorized and valid municipal debts undoubtedly exists, and it may be true that such vouchers or evidences of indebtedness, though put in the form of negotiable paper, are not, for that reason, void, but if not void it is clear that they derive no additional force from that circumstance.

The only safe, as well as sound, doctrine is that there is no power in a municipal corporation, as incidental to the execution of its ordinary duties, to invest its vouchers, or notes, or bonds, with the character of commercial paper. By statute or usage they may be transferable, but the transferee always takes instruments thus issued, whatever their form, *cum onere*. We are not now referring to municipal bonds, negotiable in form, issued by

express legislative authority; these possess, according to the settled law of this country, all of the incidents of commercial paper.

We have looked closely into the American cases against municipal and public corporations which hold that it is incidental to the power to create a debt to give a note or bond in payment of it, but we have found no judgment which holds that the note or bond thus issued partakes of that quality of commercial paper which protects an innocent holder for value from defences or equities to which it would be subject in the hands of the payee. What we wish distinctly to hold is that this supreme and dangerous attribute of commercial paper cannot be imparted to the issues of municipal corporations, whatever their form, unless the power to do so is plainly conferred, either expressly or by implication, by the legislature, and that no such implication exists in respect to debts or liabilities arising from the discharge of ordinary municipal duties.

The argument against a general implied power in municipalities to issue commercial paper with all of the incidents of negotiability, may be briefly summarized as follows:

For hundreds of years the original of our municipal corporations have existed in England without it ever being contended or held that they could, without express authority from parliament, issue such paper. On the contrary, it is there alike conceded and decided that such authority is necessary as the basis of the power. And such has been the view always practised upon in this country from the earliest period until a very recent date. The soundness of this view is strengthened by the almost invariable practice of the legislature to confer, when it is deemed expedient, upon municipal and public corporations, in express terms, the power to borrow money and issue bonds or negotiable securities therefor.

It is a *non sequitur*, as applied to municipal and public corporations, to affirm that this power to create debts implies the power to give a negotiable bill, bond, or note therefor, which shall be invested with all the incidents of negotiability. Such an implied power is denied in England even as to private corporations

organized for pecuniary profit (other than banking or trading corporations), and this demonstrates that the alleged implication of such a power in municipal corporations is neither logically nor legally sound. But if it be conceded that, as respects private corporations, the American doctrine is otherwise, and that it is rightly so, still it does not follow that the same rule does apply, or ought to apply, to municipal corporations. They are not created for trading, commercial, or business purposes. Private corporations are more vigilant of their interests than it is possible for municipal corporations to be. The latter are in their nature governmental agencies, having in general but one resource with which to meet their liabilities, and that is by taxation, and it is upon this resource that creditors must be taken to rely. The frauds such a doctrine will enable unscrupulous officers successfully to practice, ought to weigh with decisive force against its unnecessary judicial entertainment.

It is a power without assignable limits, intrinsically dangerous, and one which will not fail to prove baneful in the last degree. Courts, when called upon to establish a new doctrine, ought to consider not only its nature, but its consequences, and cannot properly disregard the lessons of experience. A judge may well tremble when he contemplates in the light of recent experience the disasters which such a doctrine will bring upon our municipalities when it shall become generally known that such a tremendous power to Schuylerize them is lodged in the hands of their temporary officers.

Sound policy and sound legal principles are generally coincident, and so it is here. If the power to issue negotiable paper is needful or expedient for our municipalities, let it be given by the legislature that can prescribe the limits, purposes, and conditions of its exercise, and provide for the payment of the liabilities which are thus authorized.

And, finally, the argument against the existence of a general implied power in municipalities to issue commercial paper becomes, as it seems to us, absolutely conclusive in view of the rule, wisely settled, that corporate powers, especially powers

whose exercise look to the creation of public burdens, are to be strictly construed, and that however convenient at times such a power might be, it is one which is not necessary (as shown by universal experience and practice in England, and generally in this country) to enable the corporation to exercise its ordinary functions, or to carry into effect the purposes for which it was created. It is, therefore, a power which does not exist.

Our justification for this extended discussion is found in the fact that the doctrine here combated is struggling for admission into our jurisprudence. It is one which, as we conceive, is founded in a radical misconception of sound legal principles, and one, moreover, whose consequences, if it shall be incorporated into our general law, cannot be contemplated without anxiety.

It follows that, since the defendant city had no power to borrow money, in the manner attempted, to erect the wharf or to improve the streets, the bonds issued therefor are not legally binding upon it, and there can be no recovery upon them. (*Bateman* v. *Mid-Wales Railway Co. supra; Thomas* v. *Port Hudson*, 27 Mich. 320; *Hackettstown* v. *Swackhamer*, 37 N. J. Law, 191; *Regina* v. *Litchfield*, 4 Ad. & El. [N. S.] 891, 906; *Mayor, etc.* v. *Ray*, 19 Wall. 468, 480, per BRADLEY, J.)

It will not validate these bonds, so as to make them the basis of a recovery, even if it be shown that the money borrowed was in each instance used for the purpose for which recited in the bonds to have been borrowed. But the plaintiff may amend and add in respect of these bonds counts in the nature of counts for money had and received. Adhering to the decision of this court (TREAT, J.) in *Wood* v. *Louisiana* (*ante*, p. 122), at the last term, the present holder of the bonds will then be treated as the assignee of the original holder or payee in respect of the money actually lent to the city; and if, after the city obtained it, the same was in fact expended for the erection and repair of wharves, or the improvement of streets, or, possibly, if expended for other authorized municipal purposes under the authority of the city council, the amount advanced, with lawful interest, less payments received on account thereof, may be recovered. (Dillon

on Municipal Corporations, sec. 730; *Paul* v. *Kenosha*, 22 Wis. 266; *Shirk* v. *Pulaski County*, 4 Dillon, 208; *Oneida Bank* v. *Ontario Bank*, 21 N. Y. 490; *Mayor, etc.* v. *Ray*, 19 Wall. 468, 484, per HUNT, J.)

The case might be different, even in this aspect of it, if the contract was one expressly prohibited by statute; but this is a question not unattended with difficulties which it is not necessary to consider.

II. The other class of bonds, known as "road improvement bonds," were issued in renewal of bonds issued by the city in payment for stock subscribed to certain companies organized to build gravel roads from the defendant city to points in Missouri. Subscriptions to the stock of such companies was expressly authorized by the act of the legislature of February 24th, 1857 (Acts 1857, p. 302), quoted at large in the statement of the case.

Under the true construction of this act, in view of the general legislation of the state of Missouri at this period on the subject of municipal aid to railway and other companies; the almost universal practice under such legislation to issue bonds for debts of this kind; the practical construction put upon this act by the city; the special nature of the authority given; the limited amount of tax authorized by the charter to be laid for the ordinary uses of the municipality, and the decisions of the supreme court of the United States as to the scope of the power to issue bonds to pay for stock subscriptions in railways, and the general tenor of the judgments of the supreme court of the United States on the subject (*Lynde* v. *Winnebago County*, 16 Wall. 6, 12; *Police Jury* v. *Britton*, 15 Wall. 572; Dillon on Municipal Corporations, secs. 106, 107, 407, and notes), and that the inference of the power to issue bonds is in no way inconsistent with the provisions of the act — my judgment is (TREAT, J., dissenting on this point), that the city was authorized to issue bonds in payment for the stock subscribed in those companies; that it would be liable to a general judgment on such bonds, and that on those bonds falling due they might be renewed by other bonds.

The demurrer to counts 1 to 10 of the petition is sustained; to counts 12 to 17, overruled, with leave to amend, if the plaintiff is so advised.

JUDGMENT ACCORDINGLY.

TREAT, J., *dissenting.*—I dissent as to the last class of bonds named, but fully concur as to the other bonds. True, the dicta of the supreme court justify the conclusion in that respect reached in the opinion just delivered; yet, a rigid analysis might possibly show distinguishing features. If the power conferred on a municipal corporation to do certain work, or make specified improvements, is not accompanied with the power to borrow money or issue bonds—especially where a limit on the power to tax for such purposes is made—it seems untenable, as a legal proposition, that such a corporation may proceed beyond the limits of taxation permitted, not only to incur a debt therefor, but to borrow money and issue negotiable securities, cutting off all the equities between the original parties. The various legislative enactments whereby municipal corporations are created grant different powers. Some are framed on a non-debt-creating policy, so that those who insist upon immediate expenditure shall pay for the same at once, and not create obligations for another generation or subsequent voters or property-holders to pay. Other charters are framed so as to allow borrowing, looking to prospective benefits from present improvements, and, therefore, permitting the payment therefor to be postponed. Restrictions on taxation would be useless if unlimited borrowing were permitted. It is for the legislative power to determine when borrowing is permissible, and for what purposes, and to what extent, and in what form evidences of indebtedness may be issued. The rulings of the supreme court of the United States concerning municipal bonds, whereby the equities of the original transaction are not open to inquiry when the bonds are held *bona fide* and for value by others than the original holder, make it the more important to look closely into the powers under which such bonds are issued.

I can detect no controlling reason for the distinction between bonds issued for improvements made directly by the city and bonds issued in payment of subscriptions to the stock of a company empowered to make road or other improvements, unless the broad doctrine is to prevail that the power to subscribe for such stock is to be held to carry with it the power to issue bonds in payment thereof, while the power to make improvements directly does not imply the power to issue bonds to pay therefor.

If there were in the city charter, or in the charter of the railroad corporation, any authority for the city to borrow or issue bonds in payment of a subscription to shares of stock, then another proposition would be presented. In the absence of any authority beyond that to subscribe for such shares, it seems to me that the equities of the original transaction cannot be cut off by issue of negotiable securities for the payment thereof. The argument *ab inconvenienti*, always a dangerous one, cannot help out the absence of authority to borrow and issue negotiable securities. The holders of bonds under such a state of legislative enactments must rely for recovery on the doctrines announced in the opinion delivered in the case of *Wood* v. *City of Louisiana, ante.*

Hence my view is that the last class of bonds stand in the same position as the other bonds sued on, and the rulings with respect thereto should be the same, viz.: That the equities are fully open for consideration with respect to all of said bonds, so that the money really advanced for legitimate purposes may be recovered as in *assumpsit*, and not formally on the bonds, which were issued without authority.

UNITED STATES, *ex rel.* DOUGLASS, *v.* THE JUSTICES OF THE COUNTY COURT OF LINCOLN COUNTY.

1. Judgment creditors of counties in Missouri are entitled to the levy of a special tax to pay judgments obtained on railroad aid bonds, if the county cannot or does not otherwise provide the means of payment.
2. The act of the general assembly of Missouri of March 8th, 1879, known as the "Cottey act," if applicable to such judgments, is, as to bonds issued prior thereto, in conflict with the provision of the constitution of the United States which prohibits the states from impairing the obligation of contracts.

(*Before* DILLON and TREAT, JJ.)

Railroad Aid Bonds. — Legislation of Missouri. — Obligation of Contracts.

ON DEMURRER to the return of the respondents to the alternative writ of *mandamus*. The relator heretofore obtained in this court a judgment against the county of Lincoln upon coupons attached to bonds, of which the following is a copy:

"*The County of Lincoln,*

"*No.* *In the State of Missouri,* *$500.00.*

"Hereby agrees to pay to the St. Louis and Keokuk Railroad Company, or bearer, the sum of five hundred dollars, in ten years from the 1st day of July, 1870, with interest at the rate of ten per cent per annum, payable semi-annually, on the 1st days of January and July in each year, at the National Bank of the State of Missouri, in St. Louis, Missouri, on presentation and surrender of the proper annexed coupon. This bond is issued under the authority of an act of the general assembly of the state of Missouri, entitled 'An act to incorporate the St. Louis and Keokuk Railroad Company,' approved February 16th, 1857, and in pursuance of an order of the county court of said county, dated August 13th, 1868, to subscribe three hundred thousand dollars to *aid in the construction of the St. Louis and Keokuk Railroad,* and in further accordance with an amend-

ment to said order, dated June 21st, 1870. This bond shall be countersigned by the agent of said county before the delivery thereof. For the payment of this bond the faith and credit of Lincoln county is irrevocably pledged.

"In testimony whereof, the president of said county court has hereto subscribed his name, and the same is attested by the clerk of said court, and the seal of said court affixed hereto, this 21st day of June, 1870.

"LEVI BICKEL,
"*Presiding Judge of Lincoln County*
"Attest: F. C. CAKE, *Clerk.* *Court, Missouri.*"

The bonds were duly countersigned as required.

Upon this judgment, on due application therefor by the judgment plaintiff, an alternative writ of *mandamus* issued, commanding, *inter alia*, the county court of Lincoln county, and the justices thereof, "to levy and cause to be collected a special tax upon all of the taxable property subject to taxation in said county of Lincoln, in an amount sufficient to pay and discharge such judgment, with interest and costs, or that they show cause," etc.

The respondents, the judges of the county court, make a return, in which, *inter alia*, they state that there was no law in force in the state of Missouri, at the date of the issue of the bonds upon which the relator's judgment is founded, authorizing the levy of any special taxes or the drawing of any warrant upon the common fund of the county for the purpose of paying such bonds, and that the collection of the relator's judgment can be enforced, if at all, in conformity to the provisions of the act of March 8th, 1879, below mentioned. A return is also made to the effect that, under the revenue laws of Missouri in force from a date prior to the issue of the bonds on which the relator obtained judgment, the county courts have been and are limited to the levy of a tax for county purposes not exceeding one-half of one per cent upon the value of the property within the county subject to taxation, and that the pro-

ceeds of this tax are all needed for the ordinary and legitimate expenses of the county government.

The relator demurs to the return.

The subscription to the stock of the said railroad company by the county was made August 13th, 1868, and the bonds of the county issued to pay for the same are dated June 21st, 1870. The 29th section of the charter of the St. Louis and Keokuk Railroad Company, viz., the act of February 16th, 1857, recited in the bonds of the county, is in these words:

"SEC. 29. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company; and it may invest its funds in the stock of said company, and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interest and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends."

This charter contains no other provisions in respect of taxes or the mode of raising the means of paying bonds issued under the authority given by said section 29.

But there was then (1857) in force in the state of Missouri general statutes in relation to the powers, rights, duties, etc., of railroad corporations. (Rev. Stats. 1855, chaps. 34, 39.) These statutes, originally enacted in 1853, authorized the formation of corporations under general laws, and the legislature was also in the habit of granting special charters to railroad companies. The general statutes as to railroad corporations apply to companies organized under special charters, unless otherwise provided. Thus, section 57 of the railroad statutes of 1853, in relation to railroad companies, contained the provision that "all existing railroad corporations within this state, and such as now are or may hereafter be chartered, shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities, and provisions, not inconsistent with the provisions of their charter, contained in this act."

The act of 1853 was substantially carried into the revision of the general statutes of 1855 and 1865.

Section 30 of said general statutes of 1855 provides that the county court subscribing or proposing to subscribe to the capital stock of any railroad company duly organized under said law, or any other act, in this state, may, for information, cause an election to be held to ascertain the sense of the tax-payers of said county as to such subscriptions, and as to whether the same shall be paid by issues of county or city bonds, as the case may be, or by taxation. (Rev. Stats. 1855, p. 427.)

Section 31 provides that, upon the making of such subscription by any county as provided for in previous section, such county shall become, like other subscribers to such stock, entitled to the privileges granted and subject to the liabilities imposed by this act or by the charter of the company in which such subscription shall be made, and may levy a special tax to pay the subscription or bonds. (*Ib.*)

These provisions are substantially embodied in the revision of the statutes of 1865 (1 Wag. Stats. p. 305, secs. 17, 18), except that, conformably to the constitution of 1865, it was made necessary to have the sanction of two-thirds of the qualified voters to the proposition to aid railway companies, except (as construed by the supreme court of the state) in cases where special charters granted prior to 1865 gave the right to aid railways without such popular sanction. The provision as to levying taxes (1 Wag. Stats. p. 305, sec. 18), is: "That it shall be the duty of the county court making such subscription to issue their bonds or to levy a special tax, to be kept apart from other funds and appropriated to no other purpose than the payment of such subscription; but the total amount of tax levied for railroad purposes in any one year shall not exceed thirty per centum of the subscription made by the county."

Section 34 (1 Wag. Stats. p. 319) gives "all existing railroad corporations within this state, and such as may be hereafter chartered or formed, all the powers and privileges contained in this chapter."

By another section (sec. 21, 1 Wag. Stats. p. 306), any county court which has heretofore—*i. e.*, prior to 1865—subscribed to

the capital stock of any railroad in this state, "shall have all the rights and powers to provide funds to pay such subscription as are granted to county courts by this chapter, and may levy a special tax to pay the interest on their bonds, or to provide a sinking fund to pay the principal."

The above provisions, quoted from Wagner's Statutes, were originally enacted in the general railroad act of 1853.

From an early date in Missouri the power of counties to levy taxes for county or general purposes has been limited, and was so limited in 1857, when the charter of the St. Louis and Keokuk Railroad Company was granted, and has been ever since. The constitution of Missouri of 1875, now in force (article 10, section 11), contains the same limitation of the rate of taxation in counties of the class of Lincoln, with this addition: "Said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of said indebtedness."

Some further reference to the course of legislation, general and special, in respect of the power of counties to aid railways by the issue of bonds, is essential to a full understanding of the subject. The first statute in Missouri, says NORTON, J., in *State, ex rel. Watkins*, v. *Macon County*, authorizing counties to subscribe for the stock of railways was in 1837, on the charter of the Louisiana and Columbia Railroad Company. (Laws 1837, p. 247.)

The charter authorized the county courts to subscribe for stock without limit or condition of popular vote, and "to issue the notes of the county for such subscription," but contained no provision as to the means of payment. Another railroad charter, passed in 1837, granted the rights, privileges, and immunities granted by the above charter. (Laws 1837, pp. 234–247.)

And in other instances in 1837 the power to subscribe was given in the same language in respect of other railroads, and to issue notes, but no provision was made as to mode of payment. (Laws 1837, p. 243, sec. 16; *Ib.* p. 275, sec. 16.)

In 1849 the Pacific Railroad was chartered. (Laws 1849, p. 219.) Section 14 of that charter was as follows:

"SEC. 14. It shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company, and it may invest its funds in the stock of said company and issue the bonds of such county to raise funds to pay the stock thus subscribed, and to take proper steps to protect the interests and credit of the county. Such county court may appoint an agent to represent the county, vote for it, and receive its dividends; any incorporated city, town, or incorporated company may subscribe to the stock of said railroad company, and appoint an agent to represent its interests, give its vote, and receive its dividends, and may take proper steps to guard and protect the interests of such city, town, or corporation."

The same language occurs in the charter of the Missouri and Mississippi Railroad (section 13), granted March 8th, 1849. (Laws 1849, p. 376.)

At the same session (1849) another charter was granted with power to counties to subscribe and issue bonds, but containing no provision either as to protecting the credit of the county or as to levying taxes to pay the bonds. (Laws 1849, p. 284, sec. 26.)

In 1851 numerous special charters were granted to railroad companies, copying the above-quoted section 14 of the Pacific Railroad charter. (Laws 1851, p. 320, sec. 14; *Ib.* p. 371, sec. 14; *Ib.* p. 438, sec. 14; *Ib.* p. 486, sec. 14.) So in special charters granted in 1853. (Laws 1853, p. 321, sec. 1; *Ib.* p. 335, sec. 14; *Ib.* p. 340, sec. 3; *Ib.* p. 341, sec. 4; *Ib.* p. 349, sec. 30; *Ib.* p. 358, sec. 13; *Ib.* p. 375, sec. 14.)

The charter of the Lexington and Boonville Railroad Company (Laws 1853, p. 366, sec. 13) has the same clause as the Pacific Railroad, with the addition of express authority to levy a special tax, and entitling tax-payers to a certificate of stock for each one hundred dollars of taxes paid. Similar provisions are in the charter of the Missouri Valley Railroad Company (Laws

1857, p. 100, sec. 20); in that of the Canton, etc., Railroad Company (*Ib.* p. 106, sec. 20); in that of the La Grange, etc., Railroad Company (*Ib.* p. 114, sec. 20); in that of the Grand River, etc., Railroad Company (*Ib.* p. 118, sec. 20); in that of the Weston, etc., Railroad Company (*Ib.* p. 142, sec. 20).

Most of the special charters granted in 1855 contained the substance and generally the words of section 14, *supra*, of the Pacific Railroad charter. (Laws 1855, p. 409, sec. 15; *Ib.* p. 437, sec. 14.) And there are various other like instances in the charters granted in 1855. It was exceptional where any reference was made to the levy of a tax.

So in charters granted in 1857 (Laws 1857, p. 108, sec. 6); in the charter of the St. Louis and Keokuk Railroad Company, granted February 16th, 1857 (*Ib.* p. 132, sec. 29), and in other instances (*Ib.* p. 155, sec. 14; *Ib.* p. 166, sec. 15; *Ib.* p. 170, sec. 11).

The legislation of the state shows that this course was continued down to the adoption of the constitution of 1865, which required the sanction of a two-thirds vote, but, as previously stated, the supreme court of the state has held that neither the general railroad law of 1853, embodied subsequently in the Revised Statutes of 1855 and of 1865, nor any other legislation, nor the constitution of 1865, affected the power given to counties in special charters to subscribe for stock and issue bonds, and the sanction of a popular vote was not required, unless it was so expressed in the particular special charter.

The act of March 8th, 1879, commonly called the "Cottey act," is as follows:

"*Concerning the Assessment, Levy, and Collection of Taxes, and the Disbursement thereof.*

"SEC. 1. The following named taxes shall hereafter be assessed, levied, and collected in the several counties of this state, and only in the manner and not to exceed the rates prescribed by the constitution and laws of this state, viz.: The state tax, and the tax necessary to pay the funded or bonded debt of the state, the tax for current county expenditures, and for schools.

"SEC. 2. No other tax for any purpose shall be assessed, levied, or collected, except under the following limitations and conditions, viz.: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county (which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy, and collection of other taxes than those enumerated and specified in the preceding section), shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied, and collected; and such circuit court, or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied, and collected such other tax or taxes, and shall enforce such order by *mandamus* or otherwise. Such order, when so granted, shall be a continuous order, and shall authorize the annual assessment, levy, and collection of such other tax or taxes for the purposes in the order mentioned and specified, and until such order be modified, set aside, or annulled by the circuit court, or judge thereof, granting the same: *Provided*, that no such order shall be modified, set aside, or annulled, unless it shall appear, to the satisfaction of such circuit court, or judge thereof, that the taxes so ordered to be assessed, levied, and collected are not authorized by the constitution and laws of this state, or unless it shall appear to said circuit court, or judge thereof, that the necessity for such other tax or taxes, or any part thereof, no longer exists.

"SEC. 3. Any county court, judge, or other county officer in this state, who shall assess, levy, or collect, or who shall attempt to assess, levy, or collect, or cause to be assessed, levied, or collected, any tax or taxes other than those specified and enumerated in section 1 of this act, without being ordered first so to do by the circuit court of the county, or the judge thereof, in the

express manner provided and directed in section 2 of this act, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not less than $500, and, in addition to such punishment, his office shall become vacant; and the method herein provided for the assessment, levy, and collection of any tax or taxes not enumerated and specified in section 1 of this act shall be the only method known to the law whereby such tax or taxes may be assessed or collected, or ordered to be assessed, levied, or collected.

"SEC. 4. The last preceding section shall be construed to extend and apply to the county court of any county, as well as to any judge thereof, and to extend and apply to the county board of equalization, and to any other body holding or exercising any county office or public trust in the county under the constitution and laws of this state.

"SEC. 5. Any county court, or judge thereof, or county treasurer, or county clerk, or other county officer, who shall order the payment of any money, draw any warrant, or pay over any money for any purpose other than the specific purpose for which the same was assessed, levied, or collected, or shall in any way or manner attempt so to do, shall be adjudged guilty of a misdemeanor, and, on conviction thereof, shall be punished as provided in section 3 of this act.

"SEC. 6. The right of appeal to the supreme court of this state, under any of the provisions of this act, is hereby preserved to any and all persons, officers, or parties in any wise affected thereby, as in other cases, and may be prosecuted as in other civil cases.

"SEC. 7. All acts and parts of acts inconsistent with this act, or in any manner whatever conflicting with the provisions of this act, are hereby repealed.

"SEC. 8. The time fixed by law for the assessing and levying of state and county taxes, and for extending the same upon the tax-books in the several counties of this state, being within ninety days from the passage of this act, creates an emergency that demands the immediate enforcement thereof; therefore this act shall take effect and be in force from and after its passage."

Messrs. Overall, Henderson, Shields, Shippen, and others, for the relator.

Messrs. Cunningham, Carr, and others, for the respondents.

DILLON, *Circuit Judge.*—The act of March 8th, 1879, in its application to township bonds issued under the act of March 23d, 1868, which in terms authorized and required the levy of a special tax to pay the same, has been considered in the case of *United States, ex rel. Foote*, v. *Johnson County* (*infra*, note), in the western district, in an elaborate opinion prepared by KREKEL, J., in which Judge TREAT and myself concurred—all of us having heard arguments upon the question there involved.

I do not propose to enter into any additional discussion as to scope of the provision contained in the constitution of the United States which prohibits the states from impairing the obligation of contracts. The doctrine of the supreme court of the United States on the subject is thus succinctly stated by Mr. Justice SWAYNE in a recent case: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to lessen the value of the contract is forbidden by the constitution, and is, therefore, void." (*Edwards* v. *Kearzey*, 96 U. S. 595.)

No one denies this proposition, and it is not controverted by the learned counsel for the respondents. But, conceding it in all its breadth and force, they contend that it is not applicable to the relator's case. Their argument is this: When the bonds were issued, counties in Missouri could only levy for ordinary county purposes, upon the property within the county, a tax not exceeding one-half of one per cent in any one year; that this tax is levied to defray the ordinary expenses of county administration, in the category of which the payment of railroad bonds, or interest thereon, is not included; that there was no act of the legislature of Missouri, either general or special, applicable to the relator's bonds, in force when the bonds were issued, which authorized the county to levy a special tax to pay such bonds, or the

interest thereon (in which respect the relator's bonds stand, it is claimed by the respondents, on a different footing from township bonds), and hence the relator has no contract right, so to phrase it, to the levy of a special tax for the payment of his bonds; that he is, therefore, only entitled to the payment of his judgment as a general debt against the county, out of the common county fund raised by the levy of one-half of one per cent for ordinary county expenses. The respondents state, in their return, that they "are satisfied that said common fund is not more than sufficient to meet the ordinary expenses of the county" for salaries, roads, bridges, the support of the poor and of the insane, the cost of jurors, etc. They do not return that they have any special fund out of which the relator's judgment can be paid. It is manifest, therefore, and not denied, if the relator is confined to getting his pay out of the residue of the county fund (raised by the levy of the limited rate authorized for this purpose), after defraying the ordinary and necessary current expenses of county administration, that his prospect of ever getting payment is remote and doubtful.

If the bond creditors of the county have any rights worth pursuing, they must rest upon an obligation of the county to levy an adequate tax to pay the bonds, if the county is unable to pay them in any other mode. This is the vital question in the case, and all that distinguishes it from the case in the western district of Missouri before mentioned.

Has the relator, then, upon the facts shown in this case, a right to a levy of a tax specifically to pay his judgment obtained in this court upon coupons attached to the bonds of the county, issued, as before stated, in 1870, to the St. Louis and Keokuk Railroad Company, under the charter of that company, approved February 16th, 1857? This question we proceed to examine.

Under the decisions of the United States supreme court next cited, the relator would be entitled to the levy of a special tax, if such a tax is necessary, to raise the means to pay his judgment, even if there was no statute in terms giving such a right, provided there were no statute provisions, general or special,

regulating, expressly or by implication, such a right. (*Loan Company* v. *Topeka*, 20 Wall. 660, per MILLER, J.; *United States, ex rel. Heidekoper*, v. *Macon County*, cited *infra; United States, ex rel. Parsons*, v. *New Orleans*, decided by the supreme court of the United States, March 31st, 1879.)

In this last case, one question was, whether, under an act authorizing a city to issue bonds, but containing no express provision for their payment by taxation, *mandamus* will lie to compel the city to levy a tax to pay a judgment obtained upon the bonds after their maturity.

The city set up as a defence that there was no legislative authority for the levy of such a tax. The petitioner demurred to this answer, but the circuit court overruled the demurrer and denied the writ, whereupon the petitioner took this appeal. The court below proceeded on the principle that the power of taxation belongs exclusively to the legislative branch of the government, and that the judiciary cannot direct a tax to be levied when none is authorized by the legislature. The supreme court, however, holds, in a careful opinion delivered by Justice FIELD, that, although the power of taxation is a legislative prerogative, it may be delegated to a municipal corporation, and that, when such a corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless its exercise is in express terms prohibited. When, therefore, authority to borrow money or incur an obligation to carry out any public object is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it, and this, too, without any special mention that such power is granted. It is always to be assumed, in the absence of clear restrictive provisions, that when the legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that its payment shall not be left to its caprice or pleasure. Wherever a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred. The latter is implied in the grant to the former, and such implication cannot be overcome

except by express words of limitation. In the present case, the indebtedness of the city of New Orleans is conclusively established by the judgments recovered. Owing the debt, the city had the power to levy a tax for its payment, and it was clearly its duty so to do. The payment was not a matter resting on its pleasure, but a duty to the creditor, and, having neglected that duty, a *mandamus* should have been issued to enforce its observance. The judgment of the lower court was therefore reversed, and the cause remanded, with directions to issue the writ in compliance with the petition.

Here the charter of the company (section 29) expressly authorized the county to subscribe for the stock of the company and to issue the bonds of the county to pay therefor, and to take proper steps to protect the credit of the county. This was special authority to create an extraordinary debt, without limitation of amount, by the issue of commercial obligations, which must be promptly met or the credit of the county be dishonored. The statute at the time, as to ordinary county expenses, provided that these must be met out of a fund raised by a levy limited to one-half of one per cent. An opinion of the supreme court of Missouri states that it was not contemplated that interest on railroad bonds should be paid out of the ordinary and current revenues of the county. (*State, ex rel. Watkins*, v. *Macon County*, cited *infra*.)

How, then, if this be true, was the debt, the large debt authorized to be created by bonds issued to aid railways, to be paid? It is not to be presumed for a moment that it was not intended to be paid at some time, and in some way. If bonds were issued, the only resource in general for their payment would be the levy of a tax for that purpose. It must be supposed that the legislature contemplated this when necessary. The bonds were to be issued "to raise funds to pay for the stock subscribed," says the charter. This could be done only by the sale of the bonds. Who would buy them if it had been declared, as is now contended to be the case by the respondents, that such bonds are not payable out of the ordinary county revenue, or, if so, the amount of this is so limited that, after paying current ex-

penses, no residue for this purpose will ordinarily or ever remain, and that there is no authority to levy a special tax, or any tax whatever, for the purpose of paying them?

Under such circumstances, the doctrine of the supreme court of the United States, as declared in its judgment in the late case of the *United States, ex rel. Parsons et al.*, v. *New Orleans*, would apply, if there was no express or special authority to levy a tax.

The charter itself, in authorizing the bonds to be issued by Lincoln county, empowered the county "to take proper steps to protect the credit of the county." The credit of the county can be protected only in one way, and that is by paying its obligations. If there is no other way to raise the means to do this, the power to levy a tax for this purpose, according to the doctrine of the supreme court of the United States, is implied, unless, in the general or special legislation of the state, there is something to repel the implication. If there were no other power to levy taxes to pay the bonds, it is plain, under the late decision of the supreme court in the New Orleans case, that it must be deduced, if necessary to pay the bonds, from the power to take steps to protect the credit of the county, or might, if necessary, be deduced even from the power to issue the bonds.

The existence of such a power would seem to have been assumed or contemplated in the legislation of Missouri on this subject. Both prior and subsequent to the enactment of the general railroad law, in 1853, many special charters had been granted to railways, containing authority to counties along their line to subscribe for their stock, and issue bonds to pay therefor, without a vote of the people. All this time the general statutes prohibited counties from levying more than a very limited rate of taxation to pay their current expenses. These special charters, thus giving power to counties to issue their bonds in payment of stock in railways, as a rule, with but few exceptions, are silent as to the means of payment. There is, therefore, in general, no means whereby the bonds, or the interest thereon, can be paid, except by taxation—by taxes levied for that purpose.

In the late case of the *United States, ex rel. Heidekoper*, v.

Macon County, Chief Justice WAITE says: "In *United States* v. *County of Clarke* (96 U. S. 211), we decided that bonds issued by counties under section 13 of the act to incorporate the Missouri and Mississippi Railroad Company were debts of the county, and that for any balance remaining due on account of principal or interest, after the application of the proceeds of the special tax authorized by that section, the holders were entitled to payment out of the general funds of the county. In *Loan Company* v. *Topeka* (20 Wall. 660), we also decided that 'it is to be inferred, when the legislature of a state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference.'"

When the act to incorporate the Missouri and Mississippi Railroad Company was passed, the power of counties in the state to tax for general purposes was limited by law to one-half of one per cent on the taxable value of the property in the county (Rev. Stats. 1865, p. 96, sec. 7; p. 121, sec. 76). This limit has never since been increased, and the constitution of 1875, which is now in force, provides that this tax shall never exceed that rate in counties of the class of Macon (article 10, section 11). If there had been nothing in the act to the contrary, it might, perhaps, have been fairly inferred that it was the intention of the legislature to grant full power to tax for the payment of the extraordinary debt authorized to an amount sufficient to meet both principal and interest at maturity. This implication is, however, repelled by the special provision for the tax of one-twentieth of one per cent, and the case is thus brought directly within the maxim, "*expressio unius est exclusio alterius.*"

The limitation in the constitution of 1875 as to rate of taxation does not, however, apply to past indebtedness. When, therefore, these special charters provided, as they usually did, that the counties might issue bonds and take steps to protect the credit of the county, it was meant that this might be done by the levy of a tax for that purpose, if such a course was neces-

sary to meet the interest and principal of the bonds. But it is contended by the relators that, aside from this view, there is *express* statute authority, and was when the bonds of Lincoln county were issued, and has been ever since the enactment of the general railroad law of 1853, to levy a special tax to pay such bonds, and the interest thereon. This position is denied by the respondents.

It is necessary, in order to reach a correct decision of the question here presented, to examine the history of the railroad legislation of Missouri and the course of judicial decision in the state respecting it. In 1837, the authority was given for the first time to counties to aid in the construction of railways. It was not conferred by general law, but was contained in special charters to railways. Counties were authorized to issue "notes" for these subscriptions, but no means of payment were provided or pointed out. In 1849, the Pacific Railroad was specially chartered, and authority given to counties to subscribe without requiring a vote of the people, and issue bonds and protect the credit of the county; but no express power was given to levy taxes for that purpose. The charter was silent as to taxes. In many special charters granted in 1849, 1851, 1853, 1855, 1857, and down to the constitution of 1865, this provision was in substance contained. In 1853, while the legislature was freely granting special charters to railroad companies, and authorizing the county courts to subscribe for stock therein, without a vote of the people, there was passed a general "act to authorize the formation of railroad companies." (Laws 1853, p. 121.)

The 29th section of that act is as follows: "It shall be lawful for the county court of any county, and the city council of any city, to subscribe to the capital stock of any railroad company duly organized under this *or any other act in this state;* and the county court or city council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or such city as to such subscription, and as to whether the same shall be paid by issues of county or city

bonds, as the case may be, or by taxation." By the act of January 14th, 1860, amendatory of this law, the legislature changed the words "may, for information," into "shall, for information." The act of March 23d, 1861, amendatory of this act, requires an election to be held, and prohibits a subscription, unless upon a majority vote. In 1868 the supreme court held that "may" meant "shall." (*Railroad Company* v. *Platte County*, 42 Mo. 171.)

Construing all the legislation, the supreme court of Missouri, "by repeated decisions," held that where special charters contained authority to counties to subscribe without a vote of the people, this power was not repealed or affected either by the above act of January 14th, 1860, or March 23d, 1861, or the provisions of the constitution of 1865. This appears from the opinion of all of the judges in *Smith* v. *Clarke County* (54 Mo. 58, 1873).

This was held, notwithstanding the 56th section of the general railroad act of 1853, which is in these words: "All existing railroad corporations within this state, *and such as now are or may be hereafter chartered*, shall respectively have and possess all the powers and privileges contained in this act; and they shall be subject to all the duties, liabilities, and provisions, not inconsistent with the provisions of their charter, contained in sections 9, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, and 53 of this act."

This makes "*all* existing railroad corporations, and such as may be hereafter chartered," subject to the provisions of the general act in respect of subscriptions to railways, unless there is some provision in the special charter to the contrary.

The result was, according to the decisions of the supreme court of Missouri, that if a railroad corporation was organized under the general law of 1853, a popular vote was necessary to enable a county to subscribe for its stock; but if specially chartered, whether before or after the general law of 1853, with powers to counties to subscribe for stock, no popular vote was necessary, unless expressly required in the charter.

It is now contended by the respondents that if it was sound to hold that the general railroad act did not apply to powers contained in special charters giving authority to subscribe for stock, it results that the other provisions of the general railroad act, as to levying special taxes to pay such subscriptions, do not apply to subscriptions made under special charters. The force of this objection is felt. The course of reasoning of NORTON, J., in the recent case of *State, ex rel. Watkins*, v. *Macon County*, is intended to demonstrate that holders of bonds issued under the power given by special charters are not entitled to payment out of the general or common fund of the county, because there is, he says, ample provision made for their payment out of a special fund raised by the levy of special taxes for this purpose. The learned judge in the case just cited, after reviewing the legislation of the state on the subject, says: "It thus appears that the fullest provisions have been made by the general assembly for the creation of a fund, distinct from the general expenditure or common fund of a county, out of which to pay an indebtedness incurred by a county on account of a subscription to stock of a railroad company, or bonds issued in payment thereof, which fund is to be kept separate from all other funds, and to be applied to that identical purpose, and none other. These various provisions of the law have been referred to for the sole purpose of establishing the proposition that, for the payment of such obligations, resort could only be had to the *special fund*, and that it never was the intention of the legislature that the common fund, raised by taxation to defray the expenses of the county, could be made chargeable with their payment; but, on the contrary, that such latter fund was devised, provided, and intended to be charged with the payment of such ordinary expenses incurred in conducting the county government as has been hereinbefore indicated." (*State, ex rel. Watkins*, v. *Macon County*, October term, 1878.)

The relator in the present case seizes upon and urges this view in support of his claim that he is entitled to the levy of a special tax. On the other hand, the counsel for the county refers us to

the language of the chief justice of the United States in the still later case of *United States, ex rel. Heidekoper*, v. *Macon County*, October, 1878. It is there said, *arguendo:* "Our attention has been directed to the general railroad law in force when the Missouri and Mississippi Railroad Company was incorporated, and when the bonds in question were issued, and it is insisted that ample power is to be found there for the levy of the required tax. The power of taxation there granted is, as we think, clearly confined to subscriptions authorized by that act, which require the assent of two-thirds of the qualified voters of the county."

The above observations of NORTON, J., and of WAITE, C. J., were made in a case where the special charter conferring the power to the county to subscribe contained an express provision as to the amount of special tax which might be levied to pay the bonds. Such a case is distinguishable from one where there is no such provision in the special charter as to taxes, and hence the observations of both of these learned judges should be limited to the special cases respectively before them. It is not necessary in this case for us to enter into the discussion. Our impression is, in view of the silence of the special charters (especially those granted prior to the general railroad law of 1853) on the subject of taxes, that the county courts were not prohibited from using the proceeds of the ordinary taxation to pay interest on debts incurred to aid railroads if the county court should find it necessary to do so, and if there was any available surplus on hand which could be used for such a purpose. The county court might, it would seem, "protect the credit of the county" in this way if they saw fit to do so. Interest due by a county would be a legitimate and current expense of the county. If this is not so, then it results that the bonds authorized to be issued cannot be paid except by the levy of a special tax for that purpose; and authority to levy such a tax would be implied or deduced from the express power to protect the credit of the county. If Judge NORTON is right, that railroad bonds, or interest thereon, cannot be paid out of

the ordinary revenue of the county, then it results inevitably (unless a county has some special fund on hand) that such bonds, or the interest thereon, cannot be paid at all, unless there is power to levy a tax for that purpose. It would seem to us that on this point the view of the supreme court of the United States, that interest on railroad bonds may, in proper cases, be paid out of the ordinary fund of the county, is correct. We have no doubt that Judge NORTON is right in asserting that there is ample provision for the levy of a special tax to pay railroad bonds. The observations of Chief Justice WAITE, *supra*, above quoted, pertain to a particular class of bonds, and must be limited accordingly.

Inasmuch as the provisions of the general railroad law in respect of subscriptions and taxes are declared to apply not only to all railroad corporations then existing, but to such, also, as may *be thereafter chartered;* and inasmuch as the special charter of the St. Louis and Keokuk Railroad Company of February 16th, 1857, under which the bonds were issued by Lincoln county, contains the power to subscribe for its stock and to issue bonds, and also the power to protect the credit of the county; and inasmuch as there is nothing in this special charter or elsewhere inconsistent with the provisions of the general railroad law in respect of levying special taxes to pay for railroad subscriptions and bonds—our judgment is, those provisions have the same force and effect as if they had been contained in the charter of the company.

The correctness of this conclusion is placed beyond doubt by the practical construction of the legislation by the county courts, by the profession, and by this court. Down to this time special taxes have been levied by counties throughout the state to pay interest on railroad indebtedness, and the right to do this has never before been questioned, so far as the reported decisions show. The federal courts in this state, during the past six years, have issued many writs of *mandamus*, commanding the levy of special taxes of this character. Every objection which the zeal and the learned ingenuity of counsel representing com-

munities burdened by oppressive debts could present against such writs has been presented, but never until now has this objection been urged. If particular words are alone regarded, and if the scope and purpose of the legislation are overlooked, this objection may find some support, but, after all, it has no real and solid basis.

By the laws in force when the bonds in question were issued, the taxes for their payment were to be levied by the county court, and the duty to levy the tax might, it was declared by statute, be enforced by *mandamus*. (Rev. Stats. 1855, p. 429, sec. 35; Rev. Stats. 1865; 1 Wag. Stats. p. 306, sec. 20; Laws 1853, p. 137, sec. 34.) The duty was a ministerial one, directly devolved by law upon the county court, and no limitations upon its exercise were prescribed. The county court not only had the power, but it was its duty, to levy the tax whenever it was necessary to protect the credit of the county by meeting its obligations.

Such remained the law until the act of March 8th, 1879. It may be made a question whether that act was intended to apply to cases where a court of competent jurisdiction, state or federal, had issued a writ of *mandamus* commanding the levy of a tax to pay a judgment. If it was not intended to apply to such cases, it presents no obstacle to the justices of the county court in rendering obedience to the command of such a writ. If it was intended to apply to cases where such a writ of *mandamus* has issued from a court of competent jurisdiction, is it invalid as to bonds previously issued because it impairs the obligation of the contract by substantially lessening the value and efficiency of the remedy in force when the debt was created?

It is clear that it falls within the prohibition of the constitution of the United States. When the bonds were issued, the power of the county court was absolute and unconditional, and the duty simply ministerial, and capable of direct enforcement by a writ of *mandamus* to the justices of the county court. By the recent act the power is taken away from the county court, and it can only act upon the order of the circuit court or judge

commanding it to levy such a tax. The recent act has undertaken to convert the duty of levying such taxes from a ministerial into a judicial duty. The creditor has no longer a direct, plain, and adequate remedy against the county court. If that act is valid as to the antecedent obligations, and applies to the judgments in this court, let us see its effect on the rights of the judgment creditor of a county. We must, instead of issuing, as we did previously, a *mandamus* to the county court directly, commanding it to levy a tax to pay the judgment, now issue a writ commanding the county court to enter an order, if it is satisfied that there exists a necessity for the levy of the tax, to request the county attorney to present a petition to the state circuit court or judge for authority to levy the same. Suppose that such a writ is permissible, and is complied with by the county court, and then suppose the prosecuting attorney, or circuit court, or judge, does not act. The judgment creditor of this court would then be without further remedy, unless the court should issue a writ of *mandamus* to the state circuit court or judge, commanding action in the premises. The duty devolved by the enactment in question on the state court or judge is manifestly judicial. How could this court command the state court or judge to issue the order to the county court to levy the tax, since by the act that court, or the judge thereof, is to decide both upon the necessity for such a tax and "that the levy thereof is not in conflict with the constitution and laws of this state?" Suppose the state judge or court refuses to make the order, what is the judgment creditor in this court to do? We asked this question of one of the learned counsel for the respondents. He admitted that this court could not punish the state judge for disobedience, and that the only remedy of the relator was an appeal, under section 6 of the act, to the supreme court of the state. But suppose that court does not act, what, then, can the relator do? The learned counsel frankly answered, "Nothing; that such a case was not supposable." It is too plain for argument that legislation which compels this court to execute its judgments through the agency and by the assistance of the judi-

cial courts of the state is not only impracticable, but, as respects bonds previously issued, is unconstitutional.

Unless the federal courts can execute their own judgments without the intervention, or even against the opposition, of the judicial courts of the state (if it were allowable even to suppose that such opposition would ever be offered), there would soon be none so poor as to do them reverence. Legislation which compels the relator to seek the fruits of his judgment in this court by a resort to the judicial powers of the state courts must be inoperative. As to the past it is inoperative, because it impairs the obligation of the contract by substantially impairing the remedy in force when the contract is made. The mutual independence, within their respective spheres, of the state and national judicial tribunals, is a fundamental doctrine in our systems of jurisprudence. Neither tribunal is dependent on the other. Each executes for itself and by itself its own judgments. The only control of the federal over the state courts is the appellate jurisdiction of the supreme court of the United States in the limited class of cases in which an alleged federal right has been denied by the judgment of the highest court of the state. Each court is alike the court of the people of the state. Neither is foreign to the other. Both are necessary parts of one complete, harmonious system. This court possesses no power or jurisdiction not conferred upon it by the supreme law in the land, viz., the constitution and laws of the United States passed in pursuance thereof.

The federal tribunals were created for wise and necessary purposes, and they cannot refuse to exercise the powers and jurisdiction with which they are clothed without a practical denial of the rights of suitors—rights which have their origin and their guarantees in the constitution of the United States, and which are valueless unless they can be sustained and enforced by the judicial arm of the government, whenever or wherever or by whomsoever denied. When rights protected by the constitution of the United States are invaded by the legislation of congress or the states, the delicate duty—but still a duty—rests upon the

judicial tribunals, which they cannot avoid if they would, so to declare and adjudge.

The present case is one which essentially depends upon the scope, effect, and application of the provision of the federal constitution prohibiting the states from impairing the obligation of contracts. It is a serious matter in any case to pronounce a statute unconstitutional, but where the validity of a statute depends upon whether it conflicts with the constitution of the United States, it is peculiarly a question to be decided by the federal tribunals, for any decision which may be made by the state courts in favor of the statute is subject to review and reversal by the supreme court of the United States. This consideration relieves us of much of the embarrassment which we would otherwise feel in pronouncing the act of the legislature, if intended to apply to such a case as this, to be unconstitutional, and the remaining embarrassment is greatly removed by the further consideration that if we are in error our judgment can be corrected by the supreme court of the United States.

The result is that the act of March 8th, 1879, if intended to apply to judgments in this court, is wholly inoperative and void, under the constitution of the United States, as respects county bonds issued prior to its enactment.

Being of opinion that the relator is entitled to the levy of a special tax to pay his judgment, if there be no other funds of the county out of which it can be paid, the demurrer to the return to the alternative writ is sustained, and if the respondents have no further return to make, a peremptory writ will be ordered.

TREAT, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—We report in this place the case of the *United States, ex rel. Foote*, v. *Johnson County*, referred to in the foregoing opinion:

UNITED STATES, *ex rel.* ELISHA FOOTE, *v.* JOHNSON COUNTY.

The act of the legislature of Missouri of March 8th, 1879, in respect of the levy of taxes for the payment of county indebtedness, known as the "Cottey act," if applicable to the payment of judgments rendered against counties upon railroad aid bonds issued prior to such act, is in conflict with the provision of the federal constitution which prohibits the states from impairing the obligation of contracts.

United States v. Johnson County.

(*Before* KREKEL, J.)

Railroad Aid Bonds.— Legislation of Missouri.— Obligation of Contracts.

ELISHA FOOTE, the relator, is a judgment creditor of the defendant county upon railroad aid bonds.

To an alternative *mandamus* the county pleaded, in its return, the act of the legislature of Missouri of March 8th, 1879 (quoted in *United States* v. *Lincoln County*, *ante*, p. 190), in the manner set forth in the opinion of the court, to which return there was a demurrer.

John B. Henderson and others, for the relator.

Thomas C. Reynolds and others, for the county.

KREKEL, J.—The relator, Elisha Foote, on the 20th day of April, 1878, recovered in this court a judgment against Johnson county for the sum of $4,416.22 on bonds issued on account of subscription to the Warrensburg and Marshall Railroad Company, made by Warrensburg township, in Johnson county.

Relator made demand for payment, which being refused, he applies for a *mandamus* to compel the county court and treasurer of Johnson county, Missouri, to pay him any sum of money that may be in the hands of the treasurer of said county and collected for the purpose of paying the coupons on the bonds issued, and if, after such payment, any balance remains unpaid thereon, then that said county court cause to be levied, assessed, and collected by a special tax on the property of Warrensburg township, under and according to the provisions of the laws of Missouri, sufficient to pay the remainder of said judgment.

An alternative writ of *mandamus* issued, to which the treasurer makes return as follows: That the moneys collected to pay interest coupons on bonds issued by Johnson county, on behalf of Warrensburg township, amount to $4,652.28, $1,502.28 whereof are now in the hands of the treasurer; that the balance was loaned out in November, 1876, under the order of the county court, and has not been paid, and there are no other funds of Warrensburg township. Further answering, he says that he cannot pay any money except on the order and warrant of the county court.

The county court, in their first return to the alternative writ, filed September 2d, 1878, say that, on the facts set out in the treasurer's answer, which they make a part of their return, they submit whether they should answer further.

These returns being held insufficient, on leave for further return, the county court, on the 23d day of November, 1878, certifies obedience to the alternative writ, by showing that they had collected the several amounts loaned out and paid the proceeds thereof, including cash in treasury, on said judgment.

On March 11th, 1879, respondents, the county court, filed a further return, and for cause why they should not be commanded to levy and collect taxes to pay the balance remaining unpaid on said judgment, show:

1. That relator had failed to avail himself (as he was bound to do) of the law as it existed at the time of the issuing of the bonds, and still exists in the state of Missouri, giving the circuit court supervisory power over the county court regarding the levy, assessment, and collection of the tax to pay said judgment.

2. The unconstitutionality of the act under which the bonds issued.

3. That the act of the general assembly of the state of Missouri, approved April 12th, 1877, prohibited the payment of bonds issued under the so-called railroad act of March 23d, 1868, until said act shall have been declared constitutional by the courts of final jurisdiction. That the supreme court of Missouri, a court of final jurisdiction, had decided said last mentioned act unconstitutional, and the county court was thus prohibited from making payment of said judgment.

4. That they have no authority to levy a tax on real estate only, as commanded to do by the alternative writ.

5. That they can levy a tax at the regular May term of the court only.

6. That by an act of the general assembly of the state of Missouri, approved March 8th, 1879, entitled "An act concerning the assessment, levy, and collection of taxes, and the disbursement thereof," said county court is deprived of power to levy the tax mentioned in said alternative writ, except with the previous sanction of the circuit court of said county, and said judges of said county court are threatened with punishment and forfeiture of office should they levy said tax without being ordered first to do so by said circuit court.

7. The treasurer has no power or authority in the premises, except under the order of said court.

To this last and further return a demurrer is filed for insufficiency in law.

As to the first plea, that relator had not availed himself of the supervisory power given the circuit courts over county courts in Missouri regarding tax levies, it will be sufficient to say that respondents' plea does not show a state of facts falling within the supervisory power of the circuit court, even if such power could have been called into exercise in a case like the one before the court, which is doubted.

The second plea, that the act under which the bonds issued is unconstitutional and void, is pleaded, as stated by the counsel, for the purpose of being made available in the contingency of the supreme court of the United States changing its views regarding the constitutionality of the act of March 23d, 1868.

The third plea sets up the act of April 12th, 1877, as prohibiting county courts from complying with such orders as are prayed for by relator, until the act of March 23d, 1868, shall have been previously decided to be constitutional by the courts of final resort. Regarding this plea, it may be said, in the first place, that the act of April 12th, 1877, is one enabling and authorizing counties, cities, and towns to compromise their debts, and provides that no township bonds "shall be purchased, redeemed, or renewed," provisions altogether inapplicable to the case before us, in which payment of a judgment obtained on such bonds is involved. In the next place, this court, in the original case, decided the act of March 23d, 1868, to be constitutional, following the decision of the supreme court of the United States. Again, the supreme court of the United States is a court of final jurisdiction. If by the use of the word "courts" is meant that both the state and United States courts of final jurisdiction must decide in favor of the constitutionality of the act, then, for this reason, the act must be held void so far as it is pleaded and applicable to this case, for reasons more particularly pointed out in the consideration of the sixth plea pleaded. The supreme court of Missouri having held the act of March 23d, 1868, constitutional when the bonds were issued, United States courts will protect rights acquired under such holding against any change of views of the supreme court of that state, as was decided by Judge DILLON in the original case, following the adjudications of the supreme court of the United States in *Alcott* v. *Supervisors* (16 Wall. 678), *Township of Pine Grove* v. *Talcott* (19 Wall. 666), and cases cited.

The fourth plea, that the county court has no authority to levy taxes on real estate exclusively, will be disposed of by allowing relator to amend his petition for *mandamus* so as to include personal property and merchants' statements, as provided by the act of March 10th 1871, amending the act of March 23d, 1868, and by amending the alternative writ of *mandamus* herein so as to conform to the amended prayer for the writ. (*United States* v. *Union Pacific Railroad Co.* 4 Dillon, 479.)

The fifth plea pleaded, that the county court can only levy taxes, under existing laws, on the first Monday in May of each year, may not apply to a case in which special authority is given to levy, assess, and collect taxes for a designated purpose; yet this court, having due regard to the cost incurred by such collection, has always directed the levies to be made at the time and with other county revenue.

The sixth plea, setting up the act of the general assembly of Missouri of March 8th, 1879, depriving county courts of the power to levy the tax mentioned in the alternative writ, except with the previous sanction of the circuit court of Johnson county, and the threatening with punishment the violation of the law, deserves, and will receive, the consideration at the hands of the court which the legislative will expressed

in enactments is entitled to, and which it will always respect, when not in conflict with other and higher obligations resting upon it.

On the first day of February, 1871, the day the bonds and coupons upon which the judgment in the original suit was obtained were issued, the act of 23d of March, 1868, authorizing their issue, in its 2d section, provided: "In order to meet the payments on account of the subscription of the stock according to its terms, or to pay the interest and principal on any bond which may be issued on account of such subscription, the county court shall from time to time levy and cause to be collected, in the manner as county taxes, a special tax, which shall be levied on all the real estate lying within the township making the subscription, in accordance with the valuation then last made by the county assessor for county purposes."

At the time of the passage of the act of March 23d, 1868, and at the time of the issuing of bonds thereunder, the laws of Missouri provided for the levy and collection of county taxes as follows: An assessor is elected every two years, who lists and assesses all the property (not specially exempt), including licenses, in the state; he returns a list of his assessments to the county clerk; this list is passed on by a county board of equalization, and any errors are corrected by the county court. The sheriff is *ex-officio* collector, and to him a copy of the assessor's lists is furnished at a specified time. He collects the revenue, is required to make settlements with the county court, and pay over the money collected to the treasurer.

The treasurer, under the 3d section of the act of March 23d, 1868, is "required to receive and collect of the sheriff of the county the income from the tax provided in section 2 (already quoted), and to apply the same to the payment of the stock subscription according to its terms, or to the payments of interest and principal of the bonds, should any be issued in payment of such subscription; he shall pay all interest on such bonds out of any money in the treasury collected for this purpose by the tax so levied, as the same becomes due, and also the bonds as they mature, which shall be cancelled by the county court, and this service shall be considered a part of his duty as county treasurer."

The fifteenth paragraph of the constitution of Missouri of 1865 provides: "That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice ought to be administered without sale, denial, or delay."

That part of the constitution of the United States prohibiting states from passing laws "impairing the obligation of contracts," is found in all Missouri constitutions, past and present.

The second sub-division of article 6 of the constitution of the United States provides that "this constitution, and the laws of the United

States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

We have thus before us the outlines of the rights and remedies to which relator was entitled at the time of the issuing of the bonds. The question is, to what extent did they enter into the obligation and contract, and have they been in any way impaired by the several acts of the general assembly of the state of Missouri pleaded by the respondents?

The question of the effect of the constitutional provision prohibiting the states from passing laws "impairing the obligation of contracts" came under review before the supreme court of the United States as early as 1810, in the case of *Fletcher* v. *Peck* (6 Cranch, 87). In this case Georgia undertook to rescind a prior act under which individual private rights had been acquired, and Chief Justice MARSHALL, after stating that "the validity of the rescinding act might well be doubted if Georgia were a single sovereign power," goes on to say: "But she is a member of the American Union, and that Union has a constitution, the supremacy of which all acknowledge, * * * declaring that no state shall pass * * * laws impairing the obligation of contracts. * * * Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed; the restrictions on the legislative power of the states are obviously founded in this sentiment, and the constitution of the United States contains what may be deemed a bill of rights for the people of each state."

The rescinding act was held to be void.

The case of *Bronson* v. *Kinzie* (1 How. 311), was regarding the validity of an act of the legislature of Illinois, which, after the mortgage had been given, enacted a law giving mortgagors the right to redeem within twelve months after sale, and prohibiting the sale from being made at less than two-thirds of its appraised value. This act was held to be unconstitutional. After discussing at great length rights and remedies, Chief Justice TANEY, speaking of the remedy, says: "It is the part of the municipal law which protects the right, and the obligation by which it enforces and maintains it. It is this protection which the clause in the constitution now in question mainly intended to secure, and it would be unjust to the memory of the distinguished men who framed it

to suppose that it was designed to protect a mere barren and abstract right, without any practical operation upon the business of life."

In *Hoffman* v. *City of Quincy* (4 Wall. 535), Mr. Justice SWAYNE, speaking of the remedy, says: "The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion. The 'obligation of a contract' is the law which binds the parties to perform their agreements, citing *Sturges* v. *Crowninshield*. The prohibition has no reference to the degree of impairment; the largest and the least are alike forbidden, citing *Green* v. *Biddle*. The objection to the law on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviations from its terms by postponing or accelerating the period of performance which it prescribes * * * impairs the obligation."

In the case of *White* v. *Heart* (13 Wall. 646), when an act of the Georgia legislature came under review, the court says that "the ideas of validity of a contract and the remedy to enforce it are inseparable, and both are parts of the obligation which is guaranteed by the constitution against invasion." Accordingly, whenever a state, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the constitution, and, to that extent, void. *Walker* v. *Whitehead* (16 Wall. 314) is to the same effect.

In *Murray* v. *Charleston* (6 Otto, 433), decided at the October term, 1877, the United States supreme court, speaking through Justice STRONG, says: "The provision of the constitution that no state shall pass a law impairing the obligation of a contract, is a limitation upon the taxing power of a state as well as upon all its legislation, whatever form it may assume." (See, also, 4 Dillon, 238, note.) The effect of this doctrine upon limitations of taxation placed in constitutions and laws of states after the time of contracting the obligations, is easily seen.

The last reported utterance of the supreme court of the United States, in *Edwards* v. *Kearzey* (6 Otto, 595), is that the remedy subsisting in a state when and where the contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects the remedy as to substantially impair and lessen the value of the contract is forbidden by the constitution of the United States, and, therefore, void. In this case the court goes over the whole ground, approving their former holdings, and giving a very instructive review of the past, in many particulars specially applicable to our present condition.

The state authorities are abundant, and as pointed and direct on the question under consideration as the federal. Citing a few of the many may suffice, commencing with Missouri.

In *Baily* v. *Gentry* (1 Mo. 164), decided in 1822, the question was the constitutionality of the stay law for two and a half years, unless property two-thirds in value be taken by creditors. Judge McGIRK cites *Sturges* v. *Crowninshield* (4 Wheat. 122), and adopts Chief Justice MARSHALL'S definition, holding that a contract is an agreement to do or not to do a particular thing; the law binds him to perform his undertaking, and this is, of course, the obligation of his contract. "The defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum at that day, and this is the obligation. In the definition of Chief Justice MARSHALL of the obligation of a contract we most heartily acquiesce. Any law that releases a part of the obligation, in the literal sense of the word, impairs it. The means afforded to enforce satisfaction for a breach of contract are, perhaps, of themselves no part of the contract; yet they may form a part of the binding force of a contract; for without legal means to enforce the performance of a contract, it can have no legal effect. It is in law as if no contract existed." Speaking of the remedy, the court says that under the constitution there always must be a remedy, "and this remedy is to be applied without any postponement or hinderance."

The question came again before the supreme court of Missouri in *Baumgardner* v. *Howard County* (4 Mo. 40). Here the constitutionality of a stay law which had been passed, staying collection of judgments under ten dollars one month, under thirty dollars two months, and under ninety dollars four months, was involved. The court affirms its holding in *Baily* v. *Gentry*, above cited.

In the case of *Stephens* v. *Andrews* (31 Mo. 205), Judge NAPTON, speaking for the court, approvingly cites the Missouri and Illinois cases, *Bronson* v. *Kinzie* (1 How. 311) and *McCracken* v. *Haywood* (2 How. 268), and says: "The propriety of overruling these decisions, even if they did not meet the entire concurrence of the judges now composing the court, might very well be questioned. But the decisions of the supreme court of the United States, in the two cases cited, are quite as conclusive on the subject as the adjudication here."

A more recent decision of the supreme court of Missouri (*State, ex rel. Aull and Pollard*, v. *Shortridge* [March term, 1874], 56 Mo. 126), brought under review the levy of a tax of more than one-twentieth of one per cent, under the charter of the Missouri and Mississippi Railroad Company. The court, after determining that the tax levy is limited to one-twentieth of one per cent, says: "At the time this railroad charter was passed, the general law authorized county courts which had issued bonds to railroad companies to levy taxes without limitation to pay the interest on their bonds, and to provide a sinking fund to pay the principal (1 Rev. Laws of 1855, p. 429, sec. 34). This provision was con-

tinued in the general statutes of 1865, and is still the law of this state [that is to say, at the time when the opinion was delivered]. And no doubt this provision would have entered into and formed a part of these bonds, and might have so entered into the obligation of the contract as to prevent a subsequent repeal by the legislature if there had been no restriction contained in the special act authorizing this subscription." As there are no restrictions in the act of March 23d, 1868, under which the bonds issued, the above doctrine applies in full force, and is in exact harmony with all the cases hereinbefore cited. See, also, *State, ex rel. the Attorney General*, v. *Miller*, 66 Mo. 329.

Other state courts are in harmony with Missouri courts. The case of *Blair* v. *Williams* came before the supreme court of Kentucky in 1823, and is reported in 3 and 4 Littell, 35. It involved the constitutionality of a stay law of that state, and the court holds that "the legal obligation of a contract consists in the legal remedy, and that the clause in the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts refers to the legal obligation, and not to the obligation arising from conscience alone, and that a law passed after the contract is made, extending the time of payment of a judgment, impairs the obligation of a contract and violates the constitution of the United States." See, also, *Sabatier* v. *Creditors*, 6 Martin (N. S.), decided in 1828; *People* v. *McLane*, 10 Cal. 563; *Tennessee Railroad Co.* v. *Moore*, 36 Ala. 371; *People* v. *Brooks*, 16 Cal. 11; *Oatman* v. *Bond*, 15 Wis. 20; *Hadfield* v. *City of New York*, 6 Robt. 501; *Jones* v. *McMahon*, 30 Texas, 719.

This citation of authorities, which could be extended almost without limit, establishes that the provision of the constitution of the United States prohibiting legislatures from impairing the obligation of contracts was intended to secure contracts, as well as remedies substantially necessary for the enforcement thereof, against state interference, and neither can be impaired by state constitutions, laws, or adjudications.

The authorities are conflicting as to the extent to which legislatures may control the remedies; but all agree that such as existed at the time of entering into the contract cannot be so changed as to make it less valuable. The changing and enacting of new laws, thereby establishing additional tribunals, requiring them to pass on questions over which, from the very nature of federal judicial power and jurisdiction, they can have no control, thus or in any other manner causing unreasonable delays, fall within the constitutional prohibition.

Let us examine, in the light of reason and adjudication, the act of the general assembly of the state of Missouri of March 8th, 1879, in order to see whether it is in conflict with them. At the time the bonds sued on were issued, the law authorizing their issue required the county court to levy and cause to be collected, as other county revenue, a spe-

cial tax sufficient to pay the interest and principal of the bonds as either became due — a simple, direct, and short proceeding.

The act of March 8th, 1879, in its 1st section, limits the assessment, levy, and collection of taxes to state revenue, the payment of interest on the state debt, the taxes for current county expenditures, and for public schools, not to exceed the rates prescribed by the constitution and laws of this state, thereby abrogating the provisions of the act of March 23d, 1868, which directs the county court to levy and collect, as other county revenue, taxes to pay the interest and bonds issued under it. But the collection may take place under the 2d section of the act of March 8th, 1879, providing that the prosecuting attorney of the county, at the request of the county court, shall present a petition to the circuit court or judge, setting forth the facts and specifying the reason why other than the taxes in the 1st section specified should be collected; and if the court or judge is satisfied of the necessity of the collection of other taxes not in conflict with the constitution and laws of the state, he may make the order for the collection of the tax. Under these provisions, take the case of relator Foote, who obtained a judgment on township bonds — a class of bonds the supreme court of Missouri has declared void, and the supreme court of the United States valid — what would be the undoubted action of the state circuit judge, who, under the recent act, is to determine whether the tax is in conflict with the constitution and laws of the state? It could be but one way, and that against the validity of the tax, notwithstanding the provision for payment of the obligation under the act authorizing the issuing of the bonds. The act of the 23d of March, 1868, directs the county court "to levy and cause to be collected, in the same manner as other county taxes," a special tax to pay the interest and bonds. The 1st section of the act of March 8th, 1879, limits the collection of county revenue "to current county expenditures," and relegates the collection of all other taxes to the 2d section of the act, under the proviso "that the circuit court or judge, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy, and collection thereof will not be in conflict with the constitution and laws of this state," shall make an order directing the county court to levy and collect such tax. As the supreme court of Missouri has decided the bonds for the payment whereof the taxes are to be levied void, the circuit court or judge, as before stated, could act but one way, and that is, refuse to make the order for the levying of the tax, thereby denying relator all remedy.

But this is not all. Judgments of United States circuit courts held valid by the supreme court of the United States are virtually, under the recent act of the legislature, if applicable to such judgments, to be submitted to the county and circuit courts of the state of Missouri, and if by either found invalid, the provision requiring the collection of a tax,

found in the act of the 23d of March, 1868, upon the faith of which the bonds issued, are to be ignored and held to be of no avail to the relator. Such is not the law. The courts of the United States are as much the courts of the people of Missouri as their own courts. The judgments of federal courts are to be treated in the states as at least of equal standing as judgments of state courts, and should as readily be obeyed and carried into effect. The law of March 8th, 1879, must be declared inapplicable to the proceedings in this case — held void so far as it attempts to affect it, and held not to be a sufficient return to the alternative writ of *mandamus*.

Regarding the 5th section of the act under review, which provides punishment for violations of the provisions of the act, the question arises, is it intended to prohibit the employment of the ministerial machinery of the state by punishing its officers for obeying judicial orders and process of United States courts? Notwithstanding the strong tendencies disclosed throughout the whole act, and specially in the section already examined, such a conclusion should not be arrived at unless there is no escape from it for obvious reasons. As already stated, the courts of the United States are the courts of the people of Missouri, and as such should find their ready support. A successful denial of a partial use of the ministerial machinery of the state by the United States courts for purposes of enforcing its judgments, might necessitate the creation of additional federal officers, or the employment of the present force in a manner not likely to be more acceptable to the people of the states than their own officers. The common bond of union can only work out its full benefits by a ready discharge of duty which comity and the relation of the states and the people thereof owe to each other.

For these and other reasons, no presumption that the act of the legislature under review is intended to deny the use and employment of the ministerial machinery of the state in executing process of the United States courts will be indulged in.

It is strongly urged in argument that the taxes asked to be collected cannot be collected or paid without incurring criminal penalties provided in the 3d and 5th sections of the act under review. This is nothing new. The question came before the supreme court of the United States in *Riggs* v. *Johnson County* (6 Wall. 166), and the remedies are there pointed out in case of interference with persons or officers who are directed and carry out orders or process of the United States courts. See, also, *United States, ex rel. Hewett and Cooper*, v. *Silverman* (4 Dillon, 224). As said in the former case, no such apprehension as interference with the process of this court will be anticipated.

The question lately decided by the supreme court of Missouri in the case of *Watkins* v. *County Court of Macon County* (not yet reported),

whether county courts in ordering warrants on the treasurer are acting judicially or ministerially, need not be reviewed in the case before the court, for under any proper reading of the decision it is inapplicable here, for it will hardly do to say that when a law, as in the act of March 23d, 1868, directs special taxes to be levied and collected for a specific purpose, that to draw warrants, if such are necessary, in favor of those entitled to the money collected, is a judicial act. The question whether *mandamus* is the proper remedy to compel county courts to make levies and enforce the collection of taxes when required by law to do so, or to compel the issue of warrants on the treasurer on a specific or general fund, has been so often determined in this court, with the approval of the supreme court of the United States, that it can scarcely be said to be an open question. (See *United States, ex rel. McKee*, v. *County Court of Vernon County*, 3 Dillon, 281.)

A suggestion has been made that the act of March 8th, 1879, may not have been intended to act retrospectively, nor intended, by the use of the words "the tax for current county expenditures" in its 1st section, to interfere with collections provided for in the 2d section of the act of March 23d, 1868, which directs the collections to be made "in the same manner as county taxes." Such an interpretation, however gladly we would accept it, seems difficult to harmonize with the whole tendency of the act. The return of respondents certainly does not proceed upon that idea, for such a construction would show its insufficiency as a return.

The conclusion arrived at is that the act of March 23d, 1868, points out a plain ministerial duty to be performed by the county court, without let, hinderance, or supervision of the circuit courts of the state; that the act of March 8th, 1879, deprives the county court of this power and transfers it to the circuit court or judge, who is to act under limitations, seriously affecting, if not altogether depriving relator of his rights. This so impairs his remedy given by the act under which the bonds issued as to substantially lessen the value and efficiency thereof, thereby falling within the constitutional prohibition as expounded by a long line of federal decisions culminating in 6 Otto, October term, 1877, heretofore cited.

The further return of the county court of Johnson county is held to be insufficient, and the demurrer thereto sustained, and a peremptory writ of *mandamus* ordered.

I am authorized to state that Judges DILLON and TREAT concur in this opinion.

ORDERED ACCORDINGLY.

FAUNTLEROY *v.* CITY OF HANNIBAL.

On matured bonds and coupons of a Missouri municipal corporation, interest is allowable upon bonds payable in New York calling for ten per cent until payment, in accordance with the terms of the contract at ten per cent, and under the Missouri statute so much of the judgment as relates to the principal of the bonds and accrued interest thereon must continue to bear interest at that rate; upon coupons payable in New York and expressing no rate of interest, the statute of Missouri governs, and only six per cent is allowable, and so much of the judgment as relates to such coupons and accrued interest thereon must continue to bear that rate of interest.

(*Before* DILLON and TREAT, JJ.)

Bonds. — Coupons. — Judgment. — Interest.

THIS is an action on matured bonds and attached interest coupons, issued by the city of Hannibal, in the state of Missouri, of the following form:

"*No. 6.* *State of Missouri.* *$1,000.*

"*Bond of the city of Hannibal issued to pay calls on subscription for stock in the Pike County Railroad, Illinois.*

"Twenty years after date the city of Hannibal promises to pay to the order of A. O. Nash, auditor of said city, or bearer, at the American Exchange Bank, New York, one thousand dollars, for value received, without defalcation, with interest on the same at the rate of ten per cent per annum, and payable semi-annually at the same place — that is to say, fifty dollars on the 1st day of October, and a like sum on the 1st day of April, in each year — upon the presentation of the coupons severally hereto annexed, until the payment is well and truly made of the said principal sum of one thousand dollars.

"In witness whereof, I, the mayor of said city, hereto subscribe my name and cause the seal of said city to be affixed, and the auditor of the said city countersigned the same, at the city aforesaid, this 1st day of April, A. D. 1858.

"(Signed.) GEO. W. SHIELDS, *Mayor.*

"(Signed.) A. O. NASH, *Auditor.*"

Coupon.—"$50. Cashier of the American Exchange Bank, New York, pay the bearer fifty dollars on the 1st day of October, 1877, for one-half year's interest on bond issued by the city of Hannibal in aid of the construction of the Pike County Railroad, Illinois.

"No. 39, B. 6. (Signed.) A. O. NASH, *Auditor.*"

After trial on the merits the court decided for the plaintiff, and in liquidating the amount of the judgment the questions arose how interest should be calculated upon the securities, and what rate of interest the judgment should bear. The rate of interest in New York, where the instruments sued on are by their terms made payable, is seven per cent. The statute of Missouri, the state where the contract was entered into, and in which the suit is brought, contains, *inter alia*, the following provisions as to interest (1 Wag. Stats. p. 782):

"Creditors shall be allowed to receive interest at the rate of six per cent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts."

"The parties may agree, in writing, for the payment of interest not exceeding ten per cent per annum, on money due or to become due upon any contract."

"Interest shall be allowed on all money due upon any judgment or order of any court from the day of rendering the same until satisfaction be made by payment, accord, or sale of property; all of such judgments and orders for money upon contracts bearing more than six per cent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear six per centum per annum until satisfaction made as aforesaid."

Plaintiff claimed in argument:

1. Ten per cent on the principal of the bonds up to liquidation.

2. Ten per cent on so much of the judgment as related to the principal of the bonds and accrued interest thereon since maturity.

3. Seven per cent on the coupons to the date of judgment.

4. Seven per cent on so much of the judgment as related to the coupons and accrued interest thereon since maturity.

As to the principal, and also as to the portion of the judgment based on the principal and interest accrued thereon since maturity, under the Missouri statutes the terms of the contract expressed in the bonds govern.

As to the coupons:

1. Interest is allowable from maturity. (*Gelpcke* v. *Dubuque*, 1 Wall. 206; *Aurora* v. *West*, 7 Wall. 82; *Town of Genoa* v. *Woodruff*, 92 U. S. 502.)

2. The law of the place of payment governs, viz., New York. The contract was made by the parties with reference to place of performance, and the law of that place controls. Neither the law of the place where the contract was made, nor where now sought to be enforced, applies. Making the coupons payable in New York was, in law, equivalent to saying that they should bear seven per cent after maturity; if this be so, the portion of the judgment relating thereto should continue to bear the same rate. (*Bank of Louisville* v. *Young*, 37 Mo. 407; 2 Parsons on Contracts, 585; *Gelpcke* v. *Dubuque*, 1 Wall. 206; *Miller* v. *Tiffany*, 1 Wall. 310; *Goddard* v. *Foster*, 17 Wall. 143; *Jeffersonville* v. *Patterson*, 26 Ind. 16.)

The United States supreme court, in *Gelpcke* v. *Dubuque* (per CLIFFORD, J.), says: "Municipal bonds, with coupons payable to bearer, having by universal usage and consent all the qualities of commercial paper, a party recovering on coupons is entitled to the amount of them, *with interest and exchange at the place where by their terms they were made payable.*"

3. The cases of *Rogers* v. *Lee County* (3 Dillon, 529) and *Cromwell* v. *Sac County* (96 U. S. 51) do not control this case, because based on Iowa statutes, as follows: "The rate of interest shall be *six* cents on the hundred by the year on money due by express contract, *unless a different rate be expressed* in writing." "Parties may agree, in writing, for the payment of interest not exceeding ten cents on the hundred by the year."

"Interest shall be allowed on all money due on judgments and decrees at the rate of *six* per cent per annum, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate *expressed in the contract*, but no judgment or decree shall draw more than ten per cent per annum, which rate must be expressed in the judgment or decree." (Revision of Iowa, 1860, secs. 1787, 1788, 1789.)

In the Lee county case interest was allowed on the coupons at *seven* per cent to liquidation, and the rate was lowered to six when judgment was entered. Under the Missouri statute, *supra*, the judgment continues to bear the same interest borne by such contracts.

The Sac county case related to coupons by their terms expressly made payable either in New York *or* in the state of Iowa. Hence the United States supreme court applied thereto the statute law of Iowa, which was also *lex fori*. The decision is to be limited in its application to the very case in hand. It cannot be extended to this case to the subversion of the well established principles of commercial law.

Grant & Grant and *Joseph Shippen*, for the plaintiff.

Krum & Krum, for the defendant.

DILLON, *Circuit Judge.*—The Missouri statutes on the subject of interest must govern. The contracts were made in this state and are sought to be enforced here. No substantial difference as to the points here involved exists between the statutes of Missouri and those of Iowa, which have received judicial construction, both by the United States circuit court for Iowa and by the United States supreme court. Applying those rulings to this case, we hold that the plaintiff is entitled to *ten* per cent interest upon the principal of his bonds from their maturity to date of judgment, and that thereafter so much of the judgment as relates thereto must continue to bear the same rate. This is because the Missouri statute allowed the parties to so contract,

and they by the terms of the bonds did so contract. And we further hold that the plaintiff is entitled to but *six* per cent upon the coupons, as there is no rate of interest expressed therein, and that thereafter the portion of the judgment relating to the coupons and accrued interest thereon must continue to bear the same rate. (*Rogers* v. *Lee County*, 3 Dillon, 529; *Cromwell* v. *Sac County*, 96 U. S. 51.)

Let judgment be entered accordingly.

TREAT, J., concurs.

JUDGMENT ACCORDINGLY.

WEBBER *v.* HUMPHREYS.

A motion, under the Missouri statute as to corporations, for execution against a stockholder cannot be removed to the federal court. It is not a "suit at law or in equity," within the meaning of these words as used in the statutes giving the right of removal of causes from state to federal courts.

(*Before* DILLON and TREAT, JJ.)

Removal of Causes.— What is a Suit at Law or in Equity?

ON MOTION to remand to the state court. The facts appear in the opinion.

Mr. Wieting, for the motion.

Mr. Shepley, contra.

DILLON, *Circuit Judge* (orally).—This is a motion by Webber to remand the case to the state court. Strictly, it should have been in the form of a motion to dismiss. It appears upon the record filed in this case that Webber some time since recovered a judgment against this corporation, known as the Illinois and St. Louis Bridge Company, for a considerable sum of money. It also appears that an execution has been issued on that judgment and returned *nulla bona*. That judgment was

recovered in the circuit court of the state for the city of St. Louis, and the execution on the judgment issued out of that court. When the execution was returned, the plaintiff in the judgment made a motion for execution against, among others, Solon Humphreys, alleging that he was the holder of a large number of shares of the stock of this corporation, and that those shares had not been fully paid. That motion was based upon this clause of the statute of the state of Missouri (1 Wag. Stats. p. 291, sec. 13), occurring in the chapter on corporations: "If any execution be once issued against the property and effects of a corporation, and there cannot be found whereon to levy such execution, then such execution may be issued against any of the stockholders to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon." The double liability having been repealed in 1870, the present attempt is to compel Mr. Humphreys to pay the amount alleged to be due on his stock as a debtor of this corporation. Substantially, when we arrive at the essence of this proceeding, the idea is this, that Mr. Humphreys, as the holder of unpaid stock, is a debtor to the corporation, and creditors of the corporation have a right to subject that debt to the payment of their claims. This provision, that execution may issue against the stockholder of an insolvent corporation on the return of *nulla bona*, is accompanied by this proviso, viz.: "*Provided*, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon *motion* in open court, after sufficient notice in writing to the persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly." When proceedings of the character above named have been had, an execution issues against the stockholder to enforce his liability to pay. Such a motion was made in the circuit court of the state in which this judgment was rendered, and notice was given to Mr. Humphreys that an application would be made for an execution against him under this statute. He filed an application to re-

move the case as made by this *motion* to this court, alleging everything that was necessary to entitle him to a removal, so far as citizenship and value are concerned.

The question is whether a *motion of this kind* may be removed. Of course, that question depends on a true construction of the acts of congress in that regard. From the earliest legislation on this subject down to the present time, the nature of the cases that may be removed have been described substantially in the same language. In the 12th section of the original judiciary act, in the act of 1866, in the act of 1867, known as the local prejudice act, and in the broad and comprehensive act of 1875, also in the Revised Statutes, where the earliest enactments are embodied, the language as to value is: "Any suit wherein the amount in dispute exceeds the sum or value of $500;" and in the act of 1875 (section 2), descriptive of the cases which may be removed, it is stated that "any suit of a civil nature, at law or in equity, in which the amount in dispute exceeds the sum of $500," may, under certain prescribed conditions, be removed.

The suit must be one of a civil nature, at law or in equity. This is a proceeding against Mr. Humphreys to compel him, under this statute of Missouri, to pay for his stock. If it is a civil "suit at law or in equity" within the meaning of the act of 1875, he is entitled to have it removed; if not, he is not thus entitled.

In the case of *West* v. *Aurora* (6 Wall. 139), Chief Justice CHASE said: "A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon the defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court." This undoubtedly expresses the general rule. There are several other cases reported which have some bearing on the present case, and the substance of them in this regard is substantially this: that it is the main suit or controversy between the parties that is removable, and not a mere sequence or dependency of a suit. On the circuit there is reported a decision (*Chapman* v. *Barger*,

4 Dillon, 557), arising under the statutes of Iowa, as to the rights of an "occupying claimant." It had the approval of all the judges of that circuit court, including Mr. Justice MILLER. That case, in substance, was this: The Iowa statute provides that where, in an action of ejectment, the plaintiff recovers a judgment for the property against the defendant holding the property in good faith and under color of title, and the unsuccessful defendant has made improvements, no execution shall issue to put him in possession if the defendant, in a given time, files a petition in the case, asking to be allowed the value of his improvements. Such a judgment was rendered in a state court against a party, and in due time he filed a petition — the unsuccessful defendant in the ejectment suit — for an allowance for his improvements, and the plaintiff in the ejectment suit thereupon applied to remove the case to the federal court, and the question was whether the contest between him and the defendant in respect to the value of the improvements was cognizable on that removal by the federal court. We held that the petition of the occupying claimant could not be removed. In that case the court says: "We hold that the petition of the occupying claimant cannot be removed, as, under the Iowa statute and decisions of the supreme court of the state, it is essentially part of and ancillary to the main suit. The main suit is at an end, and a judgment has been rendered therein in the state court. That judgment must remain in the state court; it cannot be brought here. The petition of the occupying claimant — whose rights are wholly statutory — is a dependency of the main suit, and cannot be separately removed. Under the legislation of Iowa in respect of occupying claimants, as construed by the state supreme court, and in view of the relief to which each party is entitled, it is apparent that the rights of the parties must be adjudicated in one and the same court." An apparent exception to this principle is presented in the case of *Patterson* v. *Boom Company* (3 Dillon, 465). It was decided in that case that a suit in the state court between a land-owner and an incorporated company exercising the right of eminent domain, where the ques-

tion to be tried was the value of the land, was a suit of such a nature as could be removed to the federal court, although the proceeding in its inception was an appraisement by commissioners appointed under the charter of the company. The legislation in Minnesota, under which that case arose, is peculiar. It provides that when a condemnation is had, if the owner is dissatisfied, he may take an appeal from the sheriff's jury, or whatever the local inquisition is, to the court of the state; and provides, further, how it shall be conducted — that one party shall be the plaintiff and the other the defendant, and that the only question to be tried shall be the amount of damages. It was decided, under those circumstances, that the case was removable; and within the past few weeks the supreme court of the United States has affirmed that decision. The supreme court of New Hampshire (55 N. H. 351) has decided a point somewhat analogous — to the effect that a garnishee or trustee holding credits, etc., joined as defendant for that purpose, is not within the removal acts, and cannot transfer the case as to himself, but only as between the principal parties in the suit.

The statute of Missouri on the subject of corporations, in furnishing a remedy for creditors, makes a provision, in the 13th section, that, if the corporation becomes insolvent, and a judgment is recovered against it in the courts of the state, and an execution is returned *nulla bona*, any creditor of that corporation may have execution against any stockholder in the corporation, to collect from that stockholder the balance which he may owe on his stock. That is one of the remedies which the statute of Missouri provides in respect to the liabilities of the stockholders and the rights of creditors of corporations.

In this case the creditor obtained his judgment against the corporation in the state court, and that court issued an execution thereon. This is simply a proceeding to enforce these provisions of the statutes of Missouri in regard to the liabilities of stockholders. This is not an independent suit; it is a mere sequence, dependency, or supplemental proceeding, based on the state statute, as a means of enforcing the judgment of the state court.

It is our opinion, therefore, that this proceeding cannot be removed into this court. As well might it be attempted to remove proceedings under an execution upon a judgment in the state court. The state court refused to enter an order for removal, and the stockholder filed a transcript of the case so far as to bring before us this question.

The proper entry to make is simply an order to dismiss the case.

TREAT, J., concurs.

CASE DISMISSED.

EUGENE KELLY & Co. *v.* M. H. PHELAN, Assignee in Bankruptcy of the Central Savings Bank.

1. A banker has a lien on all securities of his debtor in his hands for the general balance of his account, unless such a lien is inconsistent with the actual or presumed intention of the parties.
2. Upon the circumstances of the particular transaction, a banker's lien was established as against an assignee in bankruptcy.

(*Before* DILLON, *Circuit Judge.*)

Banker's Lien as against Assignee in Bankruptcy.

BILL of review in bankruptcy. This is a contest between Kelly & Co. and M. H. Phelan, assignee in bankruptcy of the Central Savings Bank, and the substantial question is whether Kelly & Co. are entitled to a banker's lien on certain bonds and stocks owned by the bankrupt and held by Kelly & Co. at the date of the filing of the petition in bankruptcy. The district court decided in favor of Kelly & Co., and the assignee brought this bill of review. The facts appear in the opinion of the court, which was orally pronounced by the circuit judge.

William R. Walker and *Donovan & Conroy*, for the assignee.

E. T. Farish, for Kelly & Co.

Kelly *v.* Phelan.

DILLON, *Circuit Judge.*—This is a contest which involves the right of the respective parties to a fund of about $16,000 arising from the sale of certain securities. The bankrupt is the Central Savings Bank, of this city; Mr. Phelan is the assignee. The petitioners for this fund are the firm of Kelly & Co., in New York city, bankers. Kelly & Co. had for years been the correspondents in that city of the Central Savings Bank, of this city, and the transactions between them had been very large.

It appears from the proofs here, that at times the bankrupt bank had on deposit to their credit with Kelly & Co. as high as $300,000; the deposits running down at times to a very small amount. On one occasion, in addition to the time immediately preceding the bankruptcy, there was a slight overdraft.

In 1873 the bankrupt bank was the owner of bonds of the state of South Carolina, subject to a debt to certain persons in New York city, and they directed the petitioners, Kelly & Co., to take up these bonds and hold them. The petitioners did that by paying the amount that was owing upon them out of moneys which stood to the credit of the bankrupt bank—they redeemed these bonds for the Central Savings Bank out of money which stood to the credit of the Central Savings Bank.

Sometime afterwards, in 1875, the bankrupt being the owner of two thousand shares of the capital stock of the Kansas Pacific Railway, and two hundred shares of the common stock of the St. Louis, Kansas City and Northern Railway Company, transmitted the stocks to the petitioners, Kelly & Co., *without any specific directions.* The letter in which that transmission was made is not in the record, but it is stated in the testimony it was done with a view that the stocks might be more conveniently sold if the Central Savings Bank desired to do so. It is enough to say, on this point, that there was no specific pledge, on the one hand, of these bonds to Kelly & Co., nor any express agreement that they should hold them as security for any overdrafts which might be made upon them. There was no express agreement of this kind; nor, on the other hand, was there any express agreement that they should not thus hold them, or that they were

specially pledged for any collateral or definite purpose. They were sent there under those circumstances; so that in 1876, when the bankruptcy of the Central Savings Bank occurred, the condition of affairs between these two parties was, in substance, this: The one was the correspondent of the other. Kelly & Co. had the possession (obtained in the manner which I have briefly stated) of these South Carolina bonds, the Kansas Pacific and the St. Louis, Kansas City and Northern Railway stocks.

On the 5th day of July, 1876, the Central Savings Bank awoke to a very alarming state of affairs. The day preceding had been the 4th of July—a legal holiday. There were two days' drafts to be provided for, and the clearing house showed there was a debit against them of $50,000, and they had not the means wherewith to pay. What took place in this crisis, as bearing on this transaction, is very well stated in Mr. Conroy's brief. Mr. Conroy represents the assignee, and he has stated the case as strongly for the assignee as the facts warrant, though I think he has stated it fairly. He says: "The money was not on hand to meet this $50,000 at the clearing house. The president of the bank was at once consulted, and the following telegram was the result:

"'ST. LOUIS, July 5th, 1876.

"'*To Eugene Kelly & Co., New York:*

"'Can we overdraw to $50,000?

"'(Signed.) CENTRAL SAVINGS BANK.'

"After sending that dispatch, and before receiving Kelly & Co.'s answer, the Central Savings Bank drew drafts on Kelly & Co. for about $30,000, and remitted to them $6,000.

"Kelly & Co.'s answer to the telegram was as follows:

"'NEW YORK, July 5th, 1876.

"'*To Central Savings Bank, St. Louis:*

"'Not to exceed $20,000, present overdrafts included;' which was about $10,000.

"The officers of the Central Savings Bank took it for granted that Kelly & Co. would comply with their request, and finding

that they did not, they sent the dispatch to them next copied on the day the bank failed. The bank, after doing business all day, closed on the night of July 6th, and never reopened.

"'ST. LOUIS, July 6th, 1876.

"'*To Eugene Kelly & Co., New York:*

"'Dispatch received after banking hours; drew $24,000 more currency. Protect drafts. We will remit or forward securities to cover.

"'(Signed.) CENTRAL SAVINGS BANK.'

"The promise was that they would 'remit or forward securities.' What they did in redemption of that promise was this: On the same day, July 6th, the bank officers sent two deeds for property mentioned in the record, conveying real estate, part in this city, and part beyond it, enclosed in the following letter:

"'ST. LOUIS, July 6th, 1876.

"'*Messrs. Eugene Kelly & Co., New York:*

"'GENTLEMEN:—We enclose deeds for property in this city and at Cheltenham, to secure the payment of the drafts we drew yesterday. We send this as promised, and feel certain that it and what you already have on hand will cover your advances.

"'Respectfully yours,

"'HENRY J. SPAUNHORST, *President.*'"

Those deeds went forward. I will not say, definitely, just what the entire overdrafts amounted to—it was between thirty and forty thousand dollars. The deeds of trust were received and accepted, and the property afterwards sold, leaving a large deficit. And Kelly & Co. held possession of the South Carolina bonds and the Kansas Pacific and the St. Louis, Kansas City and Northern Railway stocks. They first proved up their claim in respect to this matter as unsecured, and finding afterwards that the real estate did not cover their indebtedness, and there was a large balance due them, they asked to withdraw that as an unsecured claim, and to be allowed to prove it as a secured claim—alleging the security to be a banker's lien upon the bonds and stocks for the amount due them, after exhausting their other securities.

I have omitted a material circumstance which ought to be stated—one transaction at this end of the line, and one at the other—namely: When the officers of this bank were called upon, on the 5th day of July, to face this large deficit—to face bankruptcy or do something to prevent it—they began to canvass as to their condition, and their reliance was upon Kelly & Co. They ascertained how much they had overdrawn. They made a calculation as to what their general credit ought to be, and they made an estimate as to the value of the bonds and stocks in the hands of Kelly & Co., and estimated it at about $25,000. Now, when the telegram of the Central Savings Bank reached New York, asking to overdraw for $50,000, the officers of that bank canvassed the credit and situation of the Central Savings Bank, and they took out these securities, and made, in the language of the president of the bank, Mr. Kelly, a rough estimate—not going into particular details—of the value of the stocks and bonds belonging to the Central Savings Bank in their hands, and they estimated it roughly at $20,000. After having made this estimate they sent the dispatch which I read before: "No; you cannot draw for $50,000, but you may draw for $20,000, including the $9,000 or $10,000 that you already owe us."

These are undisputed facts. Since this is a contest between the assignee in bankruptcy of the Central Savings Bank, representing the general creditors of the bankrupt bank, and Kelly & Co., who claim a special lien upon the proceeds of these bonds and stocks, and since this is a question which turns entirely upon the fact as to whether Kelly & Co. have a lien upon these bonds and stocks for the general balance due them, it is only necessary to determine whether, under the circumstances of this case, Kelly & Co. have what is known in the law as a banker's lien on the South Carolina bonds and on the railroad stocks in their hands at the time of the failure.

Whether a banker has a lien for any general balance due him, depends upon the circumstances of the particular case. The law will not force a lien on a banker, any more than upon any one else, against the actual or presumed intention of the parties. If

there is a lien, it is because there is, at all events, nothing in the transaction which repels the presumption of giving a credit on the strength of the securities. Therefore, in the case to which Mr. Conroy called attention—a leading case on this subject—that of *Lucas* v. *Dorrin* (7 Taunt. 278), a party went to a banker and said: "I want to raise on the security of a lease a certain sum of money." The bankers considered the proposition, and rejected it. But the lease, in the language of the report, was "casually left" in the possession of the bankers, and the bankruptcy of the owners of the lease having afterwards happened, the bankers claimed they were entitled to hold this lease by virtue of a banker's lien upon it. But the court said, "No"—and very properly. "This was left here by mistake—left here casually. The party brought it here to get a specific loan upon it. You refused it, and he neglected to take it away. You cannot hold that lease as a pledge—you cannot make that available as a basis of any lien in the nature of a banker's lien."

The supreme court of the United States, which, so far as this court is concerned, must be considered to be the source of the highest authority on this subject, has had this question before them in three cases—quite famous cases—which have been referred to by the counsel: *Bank of Metropolis* v. *The New England Bank*, 3 How. 224, which went before the court again in 6 How. 373, and an illustrative case of *Wilson* v. *Smith*, 3 How. 763. The bank cases were very strong ones, and, perhaps, carry the doctrine of banker's liens as far as it has ever been carried. In substance, the case was this: Two banks were, as here, correspondents of each other. Each bank was in the habit of transmitting paper for collection to the other. In this particular case certain paper was transmitted by its correspondent, endorsed to it, and apparently belonging to the sender, to a bank to collect. The bank did collect it, and the bank which had transmitted it proved to be insolvent and owing the bank which made the collection. The bank insisted on holding the proceeds of this collection, although, in fact, the paper collected belonged to a third bank. The real owner of the paper that had been collected by

the bank brought suit against it to recover the proceeds. The supreme court of the United States held that, inasmuch as these two banks were the correspondents of each other, and inasmuch as this paper did not show on its face that it belonged to any other than the correspondent bank, the defendant bank which collected it had all the right that it would have if it had really belonged to the correspondent, and, therefore, it had a right—and they recognized the right—to hold the proceeds of that collection to secure any balance due to it, in the absence of knowledge or notice of facts to put it on inquiry that it belonged to the other bank. It is a very strong application of the doctrine of a banker's lien.

I think Mr. Conroy is entirely mistaken in arguing, under the circumstances, that, in the case at bar, there were any facts which tended to show that Kelly & Co. did not rely upon these securities. Presumptively they would rely on them, but we are not remitted or relegated to any presumption in this case, because, as I said before, it is in evidence—it is in undisputed evidence—that both parties so understood it; for when it was proposed on the part of the Central Savings Bank to make this large overdraft, they made an estimate of the value of the securities in the hands of Kelly & Co. On the other hand, Kelly & Co., before they would allow even an overdraft of $20,000, made an estimate of the value of these securities, showing that they relied on them. It is not a case where these securities had been pledged for some specific collateral purpose. Not at all. Kelly & Co. acted in the utmost good faith—something which, on this record, however it may be in fact, cannot, I think, be entirely predicated of the action of the Central Savings Bank; for here they drew without any express authority—overdrew. They sent a letter, "We will remit or forward *securities* to cover our overdraft," advising them that they had overdrawn $24,000. What would a banker understand by that? He wouldn't understand by "securities" that they were forwarding them deeds to real estate to cover advances in money.

Then, again, the understanding of the parties as to the nature

of the possession of these securities appears in this letter of July 6th: "We send these deeds as promised, and feel certain that it, *with what you already have on hand*, will cover your advances." They had nothing on hand but a large overdraft on themselves, except these bonds and stocks. True, this letter was not acted upon, because, before it reached Kelly & Co. and any drafts had been paid on the strength thereof, Kelly & Co. became aware of the failure of the bank here; still it is evidence of an understanding on the part of the bank officers here that these bonds and stocks were there as a basis of credit.

Now, on this record, I have not a particle of doubt, on the acknowledged law, the settled law in relation to the right of the banker to a lien on papers and securities in his hands, where there is no agreement that negatives it, and where such a lien is consistent with the whole transaction, that Kelly & Co. have a lien on these stocks and bonds in their possession as against the general creditors of the Central Savings Bank. That having been the judgment below, it is affirmed.

AFFIRMED.

RUSSELL *v.* ALLEN.

A conveyance of realty and other property, in trust, "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri," sustained.

(*Before* DILLON and TREAT, JJ.)

Charitable Trust for the Education of Youth in St. Louis County, Missouri, sustained.

THIS is a bill in equity by the heirs of William Russell, deceased, to subject to their demands certain funds in the hands of Allen, by him received in connection with the grants made. A demurrer to the bill is interposed.

In 1855 the decedent executed to Horner certain conveyances of realty and other property, in trust, "for the purpose of founding an institution for the education of youth in St. Louis county, Missouri." The deed prescribed the manner in which said trustee should execute his trust. The deed expresses that the conveyances were "for the use and benefit of the Russell Institute, of St. Louis, Missouri," and directed that the proceeds of said property should be paid over, "in cash, as often as once in each year, or oftener, if convenient, to Thomas Allen, president of the board of trustees of the said Russell Institute, at St. Louis, Missouri, *and his receipt therefor shall be a full discharge of the said*" trustee, Horner. There were several deeds executed by the grantor, at the same time, for property in different counties in the state of Arkansas, and the deed before us, of July 19th, 1855, declares as follows:

"And, whereas, the said party of the first part hath, by three several other deeds, bearing even date herewith, conveyed to the said party of the second part all his property in the counties of, etc., in the like manner and for the like uses and purposes as herein, now it is hereby declared that all of said conveyances, together with the present one, are made to one and the same person, Horner, for one and the same use and purpose; and that the same are, and are to be deemed, and taken, and accounted for as one trust, according to the conditions of the deeds respectively — it having been intended by said deeds to convey all the remaining property of the said William Russell in the state of Arkansas to the said party of the second part, to and for the use and benefit of the said trustees of the Russell Institute, of St. Louis, Missouri, *represented* by their president as aforesaid."

The bill charges that said Horner paid to said Allen divers sums of money, etc.; that no such institute existed at the date of the grants, or has since been created; that the purposes of the charity are too vague to be enforced, etc., and asks that said Allen be compelled to account for and pay over the funds, etc., so received by him to said heirs.

William Brown, for the plaintiff.

Thoroughman & Warren, for the defendant.

TREAT, J.—The legal and equitable propositions involved have been discussed at great length in many English and American decisions, a review of which would require more time and labor than are at our command. Many of those decisions pertain to the force and effect of the statute of Elizabeth, the doctrine of *cy-pres*, and the power "*parens patriæ*." In this country, after long doubt and disputation, the doctrine has been established that where a grant or devise for charitable uses is made, and the donee is capable of executing the trust vested in him, the grant or devise should be upheld if the beneficiary or charitable object is stated in such a manner or with such distinctness that chancery can ascertain what it is, so as to enforce the trust. In construing such instruments, equity adopts, not the old rule favoring the heir, as in England, but the juster rule of effecting the intent of the grantor or devisor. In England, the doctrine of *cy-pres* and of "*parens patriæ*" were resorted to mainly to overcome the general rule which, under British institutions, favored the heir and perpetuation of estates. Under American institutions, no such policy, and, consequently, no such general rule, ever obtained. The just rule worked out in English courts, through the doctrines or powers named, although such powers do not exist in this country, is, as to charitable uses made, though not technically, yet, to a large extent, practically, applicable in this country. By this it is not meant that the *cy-pres* doctrine has any force here, but merely that, for the purpose of upholding conveyances for charitable uses, American courts of equity will, wherever by a liberal construction it can be done, ascertain the designated or designed charity, and enforce the intention of the grantor. The various decisions of the United States supreme court, and of other courts, particularly within the past decade, are based on the sound and just doctrine that the intention of the grantor or devisor shall prevail. Hence, when, by the terms of the grant, it is clear that the heir was to

be cut off, he will be held to be cut off if the trust can be, under even a liberal construction, upheld for its designed charitable purpose.

Of course, if the grant is too vague and indefinite to enable the chancellor to detect to what charity the grant referred or was applicable, then, as the estate was not conveyed away, it (the estate) would necessarily follow the prescribed course of descent. In other words, if the decedent had not disposed of his property otherwise, the law of descents and distributions would govern. In the light of these doctrines, now fully recognized, this court must look to the conveyances in question. The purpose of the grantor was to found the Russell Institute—to have the avails of the property conveyed vested ultimately in a board of trustees for said institute, and, in the meantime, to have yearly and other payments of said avails or proceeds paid over to Allen, president, and, what is very significant, to him as *representing said trustees.*

It is obvious that the grantor knew that no such institute existed at the date of the grant; for the grant was to found such an institute in the future. In that condition of affairs, he expressed, with sufficient clearness, that, as the fund should be created from time to time by Horner, the trustee, it was to be paid over to Allen, as president, whose "receipt therefor was to be a full discharge;" and that, at the expiration of the ten years named, Horner's trust was, as soon as practicable thereafter, to cease, and all funds then in his hands to be paid, in the same manner as prior payments had been made, to said Allen, who, as president, was to *represent* said board of trustees.

It is obvious that the intention of the grantor was to have the proceeds of the property lodged in the hands of Allen, not for his individual benefit, but for the purpose of founding thereafter the designated institute, of which Allen was to be president.

In the discharge of his trust, then, it is for Mr. Allen, at the proper time, to cause such an institute to be organized, whose trustees will shape the institute and determine the persons to whom and the manner in which endowment shall be applied.

It is obvious that the grantor placed the largest measure of confidence in Mr. Allen with respect to the manner of founding such institute or calling it into corporate existence. Until sufficient funds were received therefor, such an institute could not be beneficially founded. Of course, Mr. Allen could not unreasonably delay action, nor postpone the time indefinitely. In other words, the confidence reposed, if abused by unnecessary delay or otherwise, could be controlled by the supervision of the proper court of equity, when thereto duly called upon to act. It seems that the purpose of Mr. Russell, in creating or providing for the needed endowment, did not contemplate that the result could be achieved before the lapse of ten years; for the annual payments to Allen from the date of the conveyances, it is obvious, would not furnish funds sufficient for founding such an institute at the expiration of the first or of any succeeding year prior to the expiration of the tenth year, when Horner's trust was to cease by forced sales of the property, with the exceptions named. In the meantime, Allen, receiving the annual payments and giving to Horner acquittances, was to retain the accumulating funds, until, at the expiration of the ten years, he should be able to ascertain the aggregate amount applicable to the charitable use. He could not ascertain the amount before that time, and, hence, any previous attempt to call such an institute into corporate existence would have been premature. It appears that the controlling intent of the grant is that the accumulating funds should be placed in Allen's hands, so that at the expiration of ten years he could cause such an institute to be founded, under the corporation laws of Missouri, with a board of trustees, of which he was to be president; and that when said corporation had been so created, he should turn over to it the aggregate funds in his hands. The board would thus be enabled to determine, in its discretion, with due regard to the intent of the founder, what should be the scope and details of the institute. The ultimate determination of the mode of administering the charity, whether by free or paid instruction to pupils, etc., would be for that board's action and discretion when organized.

There are many interesting questions involved in the administration of such charitable uses which are not before us for decision, such as the proper forum and parties to compel due and prompt administration of the "use" when the person charged to act fails to do so—that is, whether a United States court, before which the subject comes incidentally, can lay hold of and compel the proper administration, under its supervision, or whether application therefor must not be made exclusively to the more appropriate state courts. However that may be, in the absence of any proceeding by Allen in the nature of a cross-bill, asking the direction of this court as to the manner in which he shall execute his trust, and in the absence of any prayer of the plaintiffs in this case looking to that end, we are not called upon to decide with respect thereto. We must dispose of the questions before us as they are presented, and not go beyond them. The plaintiffs are here in hostility to the existence of the indicated fund, denying that there is such a fund for the alleged charitable uses, and claiming that the funds rightfully belong to them, *personally*. They do not ask for the administration of the fund to charitable uses, whereby their personal claim thereto would be defeated; and, consequently, this court has only one proposition to decide, viz.: whether, under the grants made and the allegations of the bill, the plaintiffs have shown any right in themselves, personally, to the fund in question. From what has already been stated, it is clear that they have no such personal right—that it is evident the grantor meant to cut off his heirs as to the property granted, and that the charity which was to be the object of his bounty is sufficiently defined to enable the funds created to be definitely applied to the charitable use contemplated.

The demurrer to the bill is sustained.

DILLON, J., concurs.

BILL DISMISSED.

NOTE.—An appeal was taken from this decree.

CITY OF ST. LOUIS *v.* JOHNSON.

The ordinary relation between a banker and his customer, as respects money deposited by the latter with the former, is that of debtor and creditor; but, on the special circumstances of this case, the relation between the two, as respects a specific sum of money remitted by the banker at the request of the customer to another bank to pay a specified debt of the customer, was held to be that of principal and agent, or trustee and *cestui que trust*, and not that of debtor and creditor.

(*Before* DILLON, *Circuit Judge.*)

Deposit in Bank.—Relation between Banker and Customer.—Debtor and Creditor.—Principal and Agent.

IN EQUITY. The city of St. Louis and the receiver of the National Bank of the State of Missouri respectively claim to be entitled to the sum of $29,564.29 currency, and $8,570.60 gold, on deposit June 20th, 1877, to the credit of the above named bank, in the Bank of the Republic, in New York.

Briefly, the material facts, as shown by the proofs, are these: The National Bank of the State of Missouri suspended payment and closed its doors on June 19th, 1877, and the defendant, Johnson, is the receiver thereof, duly appointed, under the act of congress, by the comptroller of currency. From 1870, and until its suspension, the bank was the depository of the money of the city of St. Louis. In 1872, the bank gave a bond, with security, to the city, in the sum of $500,000, conditioned that, "whereas, the bank has been selected by the city as the bank in which the money of the city shall be deposited; and, whereas, the bank has agreed to keep, subject to the lawful orders of the lawful officers of the city, such moneys or deposits as may be so deposited with said bank by said city or its lawful officers: now, if said bank shall well and faithfully keep and safely hold all such money of the city now deposited or hereafter to be deposited with it, and accurately account with said city therefor, and promptly respond to all proper and lawful demands and orders

upon such deposits, then the obligation to be void; otherwise to remain in full force."

The money of the city was deposited in the bank by the city treasurer, and was kept in a "general current account" (pass-book "H"), and was subject to be drawn out on checks signed by the city treasurer. In addition to the current account, two other special accounts were kept by the bank with the city—one was the "coupon account, gold" (pass-book "G"), and the other the "bond and coupon account, currency" (pass-book "E")—and the three accounts were represented by three pass-books held by the city, the entries in which were made by the officers of the bank. The bonds and coupons of the city fell due from time to time, and were payable in the city of New York, and it was necessary to provide funds there to meet them.

A portion of the bonds and coupons of the city was payable at the Bank of the Republic, in New York, and the rest at the Bank of Commerce, in that city. To provide for the payment of such bonds and coupons, the practice was for the city treasurer, upon the instruction of the city comptroller, to draw a check on the National Bank of the State of Missouri for the amount necessary to be placed in New York to meet maturing bonds and coupons, and endorse the check and deliver it to the bank, with written instructions to remit the amount to the National Bank of Commerce, or the National Bank of the Republic, or both, in the city of New York, to pay bonds and coupons of the city of St. Louis falling due. Thereupon the National Bank of the State of Missouri would remit, or provide a credit for the amounts specified, to the Bank of the Republic, or the Bank of Commerce, or both, with written instructions to said banks to pay, and charge to the general account of the National Bank of the State of Missouri, the bonds and coupons of the city of St. Louis maturing at said banks, and forward the same cancelled to the National Bank of the State of Missouri.

The following amounts (out of which the balances here in question arose) were remitted to New York, in the manner and for the purpose aforesaid, and at the dates stated:

April 25th, 1877.	
To National Bank of the Republic,	$ 51,000 00
To National Bank of Commerce,	122,300 00
Total,	$173,300 00
May 25th, 1877.	
To National Bank of the Republic,	$ 45,350 00
To National Bank of Commerce,	189,800 00
Total,	$235,150 00
May 29th, 1877.	
To National Bank of the Republic,	$162,000 00

The present suit only relates to the balance of the fund thus provided which remained in the Bank of the Republic at the date of the suspension of the Bank of the State of Missouri, and which had been transmitted to the Bank of the Republic, in the manner hereinafter stated, to pay the coupons of the city made payable at that bank.

To exhibit the matter clearly, the correspondence attending the transaction of April 25th, 1877, is given in full, as follows: It commenced with the following letter from the city comptroller to the city treasurer:

"TREASURY DEPARTMENT, COMPTROLLER'S OFFICE,
"ST. LOUIS, April 25th, 1877.

"*A. Geisel, Esq., City Treasurer:*

"SIR:—You will please remit the following amounts to pay bonds and interest falling due, for which warrants have been this day drawn in your favor, namely:

To National Bank of Commerce, New York:		
City sterling coupons, gold,	$57,800 00	
Proceeds and exchange,	5,000 00	—$ 62,800 00
County interest coupons, gold,	$15,000 00	
Proceeds and exchange,	1,500 00	—$ 16,500 00
City currency coupons,		43,000 00
		$122,300 00

To National Bank of the Republic, New York:

City currency coupons,	$11,000 00	
City bonds,	40,000 00	$ 51,000 00
		$173,300 00

"Very respectfully,

"RICHARD P. HANNENKAMP,

"*Comptroller.*"

Next in order is the letter of the city treasurer to the National Bank of the State of Missouri:

"CITY TREASURER'S OFFICE,
"ST. LOUIS, MISSOURI, April 25th, 1877.

"*To James H. Britton, Esq., President of National Bank of the State of Missouri:*

"SIR:—Enclosed I hand you a check for one hundred and seventy-three thousand, three hundred dollars ($173,300), which you will please have remitted to New York to pay bonds and coupons of the city and county of St. Louis falling due in May proximo:

To National Bank of Commerce, New York:

Sterling coupons, gold,	$57,800 00	
Proceeds and exchange,	5,000 00	$ 62,800 00
County coupons, gold,	$15,000 00	
Proceeds and exchange,	1,500 00	$ 16,500 00
Currency coupons,		$ 43,000 00

To National Bank of the Republic, New York:

Currency coupons,	$ 11,000 00
City bonds,	40,000 00
	$173,300 00

"Yours respectfully,

"EDWARD BROOKS,

"*Asst. Treasurer.*"

The check enclosed in the foregoing letter was in the words and figures following:

"CITY TREASURY,
"No. 903. ST. LOUIS, MO., April 25th, 1877.

"*To National Bank of the State of Missouri, in St. Louis:*

"Pay to the order of George Kissel, teller, one hundred and seventy-three thousand, three hundred dollars ($173,300).

"A. GEISEL, *Treasurer.*"

Endorsed:

"Pay to the order of National Bank of the State of Missouri.

"GEORGE KISSEL, *Teller.*"

Thereupon the National Bank of the State of Missouri wrote to the National Bank of the Republic the following letter:

"NATIONAL BANK OF THE STATE OF MISSOURI,
IN ST. LOUIS, ST. LOUIS, April 28th, 1877.

"*To Cashier of the National Bank of the Republic, New York:*

"DEAR SIR:—I enclose herein for credit in account Commerce, $51,000.

"Please pay and charge to our general account the bonds and coupons of the city of St. Louis maturing at your bank next month, and forward the same to us, as usual, cancelled.

"Yours respectfully,

"EDWARD P. CURTIS, *Cashier.*"

The above transaction appears in the pass-books held by the city, as follows: In the pass-book containing the "general current account" (exhibit "H"), the city is charged with the check for $173,300, and its general balance in bank, subject to check, is reduced by the amount named. In the pass-book containing the "bond and coupon account, currency" (exhibit "E"), the bank charges itself with the amount of $173,300, and credits itself with the purchase of gold as instructed (that is, currency paid therefor), and bonds and coupons paid in currency and cancelled, and returned to the city, and exchange on remittances, and commissions. In the pass-book containing the "coupon account, gold" (exhibit "G"), the bank charges itself with

the gold purchased, $72,800 (not the cost thereof), and credits itself with bonds and coupons paid in gold and cancelled, and returned to the city.

The same course precisely was pursued in the transaction of $235,150 on May 25th, 1877, and of $162,000 on May 29th, 1877.

The money remitted by the National Bank of the State of Missouri to the National Bank of the Republic, in New York, as aforesaid, was deposited, with the knowledge and by the direction of the city, to the credit of the National Bank of the State of Missouri, and coupons and bonds of the city, when paid by the National Bank of the Republic, were charged to the National Bank of Missouri, with commissions, and were cancelled and returned by express to the bank here, and by the bank were delivered to the city treasurer, and thereupon the bank entered in pass-book "E," if such coupons and bonds were paid in currency, a credit to itself for the amount thereof, with exchange for itself and with commissions paid to the Bank of the Republic; or, if they were paid in gold, a credit was taken by the bank in pass-book "G," for the face of the coupons and bonds so paid in gold, with exchange and commissions. The money remitted to New York to pay bonds and coupons of the city, as aforesaid, was deposited to the credit of the National Bank of the State of Missouri, and not to the credit of the city, in pursuance of an arrangement to that end, made in 1870, to prevent the money of the city being attached in New York at the suit of the holders of coupons of the city, who claimed that the same were payable in gold, and not in currency, because the bonds to which they were attached did not specify in what funds said bonds were payable. The books of the National Bank of the State of Missouri exhibit its transactions with the city in three accounts, corresponding respectively with the accounts stated in the pass-books above mentioned.

The Bank of Commerce was the general correspondent of the Bank of the State of Missouri, and this suit does not relate to

any balance in that bank. The Bank of the Republic was not the correspondent of the Bank of the State of Missouri, and the only transactions between these two banks are those relating to the payment for a series of years of the bonds and coupons of the city with funds remitted or provided for that purpose from time to time by the Missouri bank, in the manner hereinbefore shown. This suit involves only the balance of the fund thus provided remaining on hand in the Bank of the Republic when the Missouri bank suspended, June 19th, 1877.

It should also be stated that in April or May, 1877, an arrangement was made between the city and the National Bank of the State of Missouri, whereby the latter agreed to pay four per cent interest per annum on the average daily balance of the city in excess of $100,000, and this arrangement was thenceforward carried out; but under it no interest was paid save on the average daily balance of the current account, and none on sums remitted to New York, after the bank received the check of the city treasurer therefor.

The city paid the bank here exchange on the sums which it remitted to New York. The bank in New York charged a commission for paying the coupons to the bank here, which was in turn charged to and paid by the city.

When the Bank of Missouri closed its doors, there was to its credit at the Bank of the Republic, in New York, $29,564.29 in currency, and $8,570.60 in gold, being balances of funds remitted to said bank under the orders of the city treasurer in the manner aforesaid.

This notice was served on the National Bank of the Republic:

"NEW YORK, June 30th, 1877.

"*H. W. Ford, Esq., Cashier of National Bank of the Republic:*

"The city of St. Louis claims that the balance standing to the credit of the National Bank of the State of Missouri, on the books of your institution, is the property of the city of St. Louis.

"HENRY OVERSTOLZ, *Mayor.*"

The National Bank of the Republic made no claim to the funds, and, by stipulation of parties, they were withdrawn from New York, and are on deposit in the sub-treasury at St. Louis, to abide the determination of this case; and the question here to be settled is, which party has the preferable right to the money —the city of St. Louis, or the receiver of the National Bank of the State of Missouri?

Leverett Bell and *James E. Withrow*, for the plaintiff.

Henderson & Shields, for the defendant.

DILLON, *Circuit Judge.*—The receiver succeeds to all the rights of the National Bank of the State of Missouri; and, as there is no question of fraud, actual or constructive, in the case, he succeeds only to the rights of the bank as against the city to the balance on hand in the Bank of the Republic at the date of the failure of the Missouri bank.

As between the Missouri bank and the city, did those moneys in the Bank of the Republic belong to the city? Suppose the Missouri bank had not failed, and a contest had arisen between it and the city as to the balance on hand in the Bank of the Republic, would the city have been entitled to a judgment or decree that this balance was in law or in equity its money? If so, the same rights still remain. If, however, as respects this balance, the Missouri bank sustained towards the city the relation of a debtor only, this relation still remains, and the receiver is entitled to the fund, and the city must come in as a general creditor.

Suppose the Bank of the Republic had failed with the amount here in dispute on hand; on which would the loss have fallen, the city or the Missouri bank? Such an inquiry would involve the same principle which is presented in the cause now under consideration. The correct decision of the cause requires that the facts and circumstances which give it its peculiar character shall be closely regarded, and the intention and purposes of the bank and of the city kept constantly in view.

The general relation of the bank to the city was the usual relation of a banker to his customer, viz., the relation of debtor and creditor. That was the undoubted relation as to the account in the general pass-book "H." On the face of the special pass-books, "E" and "G," the same relation also exists, for the bank credits the city and charges itself with the amount received or transferred from the general account, and when it subsequently receives the coupons and surrenders them to the city, and not before, it charges the city on these books (and on its books, of which these are copies) with the amount of coupons surrendered, and with exchange on the sum remitted to New York, and also the commissions for services charged by the Bank of the Republic. It did not charge the city on the special books with the amount remitted to New York at the date of remittance, but, as just stated, only debited the city when the coupons were received here and surrendered to the city.

As between the bank here and the Bank of the Republic, the money was that of the Bank of Missouri, and not that of the city. It was intended to be so as between all three of the parties. Originally the city had a purpose in not having it appear that the money in New York to pay its obligations was its own—a purpose based upon a commendable precaution to protect its credit against unfounded pretences, and in no wise fraudulent—and that mode of transacting the business naturally continued after the reasons for it had probably ceased.

If we leave out of view the effect of the account shown in the special pass-books "E" and "G," the right of the city as against the bank would seem to be sufficiently clear. The case would then be this: The bank was the general debtor of the city, having funds subject to its check or draft. Let us take the transaction of April 25th, for it represents all the others. The city comptroller directs the city treasurer "to remit" to the Bank of the Republic $51,000 to pay the bonds and coupons of the city falling due at that bank on the following month. On the same day the city treasurer draws in favor of the bank his check for

the amount and encloses it to the president of the bank, with directions, *inter alia*, "to remit" to the Bank of the Republic, in New York, $51,000, "to pay bonds and coupons of the city falling due (at that bank) in May next." The bank at once charges the amount of that check to the city, which has the effect to reduce the city's balance with the bank and to stop interest to that extent. If the money had been passed over the counter to the city treasurer, and he had delivered it to another bank, with instructions to remit to a particular bank for a specified and definite purpose, such bank would have been the agent of the city to remit or transmit the money of the city; it would remain the money of the city, notwithstanding it may have been credited on account to the agent, and not to the principal, and this with the consent of the two. If such bank had transmitted the money by express, the money would be the city's; if by draft, it would be the agent of the city for that purpose; but when its instructions were obeyed and the money duly received by the appointed depository, all liability would be at an end. If the appointed depository failed, the loss could not be thrown upon the agent.

But the money was not paid over the counter to the city, and the city did not select some other agent or bank to remit or transmit it to the Bank of the Republic, but selected its general depository to make the remittance, and accepted a credit in another account for the same sum. The bank remitted the sum, as directed by the city, to the Bank of the Republic, with specific directions to credit the amount to it, and to use the same "to pay the bonds and coupons of the city maturing at your bank next month," and charge the amount to the account of the bank here, and forward to this bank the bonds and coupons cancelled.

The letter of the treasurer to the president of the bank made the bank here the agent of the city to remit, and if the bank here did remit accordingly, and placed the sum with the designated bank, *i. e.*, the Bank of the Republic, it did its duty, and would not be liable to the city if the Bank of the Republic had

failed with this fund on hand. Though the amount stood on the books of the Bank of the Republic to the credit of the bank here, yet that was by the city's consent and for its convenience. It imposed, as between the bank here and the city, no additional liability on the bank, and it deprived the city of none of its rights; such would be the effect of the letter of the treasurer to the president of the bank, if there is nothing to qualify or change it in the other circumstances of the case. The main circumstance relied on is that the city, at the time it gave directions to remit, accepted on another account and pass-book a credit from the bank for the same sum—the bank, by such credit, acknowledging itself to be the debtor of the city for the amount it had undertaken to remit. If this is the controlling element in the case, then the relation of debtor and creditor between the city and bank never ceased, as respects the sum directed to be remitted, and remained the same as before, and continued so to remain after the sum was placed, as directed, with the Bank of the Republic.

But, in my judgment, this is not the controlling element in the cause. The special pass-books are to be regarded as in the nature of memoranda, and adopted for the sake of convenience, and have the same effect as if the bank had given to the city a receipt for the money received, and promised therein to remit the same to the Bank of the Republic for the purpose of paying the coupons of the city.

The bank charged the city with exchange on the amount it thus received, the same as it would have charged if the draft had been for any other customer. It became the agent of the city to transmit the money. The money, when placed in the Bank of the Republic, was, as between the Missouri bank and the city, the money of the latter. When the agent presented coupons cancelled, this showed that the agent had discharged the duty it had undertaken.

It is my judgment that the relation between the Missouri bank and the city, as respects the money deposited with the Bank of

the Republic, was not that of debtor and creditor strictly, but that of principal and agent, with the duties and liabilities of the latter, and not those of the former relation. The moneys deposited by the Missouri bank in its name with the Bank of the Republic, were, as between the former bank and the city, *trust moneys*, and in equity they belong to the *cestui que trust*, and the latter has the right to pursue and claim them as against all persons who do not stand free of the trust.

This view is not regarded as at all in conflict with the cases cited and relied on by the defendant's counsel. (*Marine Bank* v. *Fulton Bank*, 2 Wall. 252; *Savings Bank Case* [MSS.], per Mr. Justice MILLER.)

A decree will be entered adjudging the money in controversy to belong to the city.

DECREE ACCORDINGLY.

NOTE. — See *Levi* v. *National Bank of Missouri*, *ante*, p. 104.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

WESTERN DISTRICT OF MISSOURI.

VITAL JARROTT *v.* CITY OF MOBERLY.

1. Municipal bonds must be issued for a *public* purpose, or they are void.
2. Bonds issued under legislative authority in Missouri to aid a railroad company in erecting "machine shops" are, it seems, bonds issued for a public purpose.
3. But the act authorizing such bonds must comply with section 14 of article 11 of the constitution, which requires the sanction of a *two-thirds* vote. As the act of March 18th, 1870, authorized the issue of "machine shop bonds" in aid of a railroad company on the sanction of a *majority* vote, it is, in this respect, unconstitutional (KREKEL, J., dissenting).
4. Constitutional provision as to "loan of credit" by municipalities to railway corporations (article 11, section 14, constitution of Missouri of 1865), construed.

(*Before* DILLON and KREKEL, JJ.)

Municipal Bonds for Machine Shop Purposes.—Public Purpose.—Constitution of Missouri (Article 11, Section 14), as to "Loan of Credit" to Railway Corporations, Construed.

THIS is an action upon coupons from bonds issued by the defendant. The bonds, styled "Moberly machine shop bonds,"

are dated May 1st, 1872, and contain the recitals hereinafter appearing. They were issued under the act of March 18th, 1870 (Laws 1870, p. 163), entitled, "An act to authorize cities and towns to purchase lands, and to donate, lease, or sell the same to railroad companies;" and the bonds recite this act as the authority for their issue, and, also, that at the election two hundred and twenty-eight votes were cast in favor of the proposition, and only one vote was cast against it.

The defendant demurred to the petition, on the ground that the act of March 18th, 1870, under which the bonds were issued, was unconstitutional.

John D. Stevenson, for the plaintiff.

Messrs. Broadhead and *Overall*, for the defendant.

DILLON, *Circuit Judge.*—This case presents a new question in respect to municipal bonds.

The bonds recite that they were issued under the act of March 18th, 1870 (Laws 1870, p. 163), in pursuance of an election held March 26th, 1872, which was prior to the act of March 29th, 1872 (Laws 1872, p. 176), amending the first-mentioned act. This last-named act, of March 29th, 1872, has, therefore, no application to the bonds now in suit, and is immaterial, except in so far as it may be regarded as a legislative confession that the original act, authorizing a *majority* of the qualified voters to create such a debt as the act contemplated, was in conflict with the constitutional provision requiring the assent of *two-thirds* of the qualified voters. (Constitution of 1865, article 11, section 14.)

The bonds in question recite that they are "issued in pursuance of an election held in said town on the 26th day of March, 1872, to decide whether the said town *should purchase and donate* to the St. Louis, Kansas City, and Northern Railway Company two hundred acres of land for machine shop purposes," etc., in accordance with the said act of March 18th, 1870.

The purchasers of the bonds are, of course, charged with notice of the facts therein stated (*Harshman* v. *Bates County*, 92 U. S. 569). They knew, therefore, the date of the election, the act under which and the purpose for which the bonds were issued.

The demurrer presents two questions:

1st. The first question is, whether the particular purpose for which these bonds were issued, viz., for "the purpose of assisting and inducing the railroad company to locate and build machine shops upon the land" purchased by the city and donated to the company, is a *public* purpose in such a sense as to justify compulsory taxation to pay the debt thus incurred.

If such aid had been given to an individual or to a private company proposing to erect shops for manufacturing or repairing machinery, the act would fall within the principles declared and established by the supreme court of the United States in the Iola and Topeka cases, and would be void. (*Loan Association* v. *Topeka*, 20 Wall. 655; s. c. 2 Dillon, 353; *Savings Association* v. *Topeka*, 3 Dillon, 376.) The supreme court there hold that a statute which authorizes the issue of bonds, to be paid by taxation, to aid individuals or private corporations to establish or carry on manufacturing enterprises, is void, because the taxation is not for a *public* purpose, although, in a remote or collateral way, the local public may be benefited thereby. (Same principle: *Lowell* v. *Boston*, 111 Mass. 454; *Allen* v. *Jay*, 60 Me. 124.)

But, as it is settled law in Missouri that aid of this character can be constitutionally given to railroad companies, it would seem to follow that if machine shops are an integral or essential part of a railroad, or necessary for its convenient use and operation (as on this demurrer we ought to assume them to be), then the act of March 18th, 1870, under which the bonds in question were issued, is not void within the doctrine of the Iola and Topeka cases.

2d. The next question is whether the act of March 18th, 1870, is in conflict with section 14 of article 11 of the state

constitution of 1865. That section provides that "the general assembly shall not authorize any county, city, or town to become a stockholder in or *to loan its credit* to any company, association, or corporation, unless *two-thirds* of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

The act of March 18th, 1870, under which these bonds were issued, authorized the municipalities therein mentioned to purchase lands and donate, lease, or sell the same to a railroad company as a means of inducing it to locate and build its machine shops on the lands, and assisting it to do so, and, for this purpose, to issue its bonds, to be paid by taxation, on the sanction of a *majority* vote. In the present suit, the bonds recite that the lands were to be purchased by the city and paid for in bonds, and *donated* to the railroad company; and this, the case of a purchase on credit and a donation, is the precise case now presented for judgment.

If this is a "loan of the credit" of the town to the railroad company, the bonds are void, because the act which authorizes this to be done on a majority vote is in conflict with the constitution, which, in such a case, expressly requires the sanction of a *two-thirds* vote.

What, then, is a "loan of municipal credit" to a railroad company within the meaning of this provision of the constitution?

The provision of the constitution confessedly had its origin in the abuses and frauds which had, prior to 1865, been seen to grow out of the unlimited power of the legislature over the subject. Literally, scores of charters and acts had been passed, authorizing county justices and municipal bodies to subscribe for stock in railways, and to issue bonds without limit as to amount, and without the sanction of the people to be affected.

The plain purpose of the constitution was to prevent or check this in the future, by the provision that municipalities shall not be permitted to incur debts in aid of railways, to be paid by taxation, unless two-thirds of the qualified voters of the munici-

pality should formally assent thereto. The constitution enumerates cities, counties, and towns (the only incorporated public or municipal bodies known to the laws of Missouri), and extended the prohibition to all of them; and it has been held to extend to *townships*, although not named in the constitutional provision. (*Harshman* v. *Bates County*, 92 U. S. [2 Otto] 568; *Jordan* v. *Cass County*, 3 Dillon, 185.)

As counties, cities, and towns had and could have no considerable funds applicable to such purposes, unless procured on credit, the convention doubtless supposed that a provision that they should not become stockholders in any corporation, or loan their credit to any corporation, without a *two-thirds* vote, would effectually accomplish the purpose in view, viz., to prevent public debts from being created for the benefit of railway corporations without the previous approval of two-thirds of the voters on whom the consequent taxation would fall.

Constitutional provisions are usually expressed in general terms, and do not descend to the detail often necessary in legislative enactments, and they are intended to secure some essential right, or to prevent wrongs or injuries or abuses. Such provisions are protective and remedial, and are not to be construed with the strictness of penal statutes, but with reference to the public ends sought to be protected or secured. The mischief felt by the constitutional convention of 1865 was that, in the absence of constitutional restriction, the legislature had conferred upon public and municipal officers unguarded powers of dangerous extent, the sting of the evil being the creation of burdensome debts to be paid by taxation. The remedy applied was that for the future municipalities should not be allowed to become stockholders in private corporations (which involves the necessity of paying for the stock), or to loan their credit to such corporations (which involves the creating of a debt for the benefit of such corporations), and both involve the necessity of taxation, unless two-thirds of the qualified voters should assent thereto. If the act of March 18th, 1870, which only requires the assent of a majority, is valid, it would have been equally

valid if the like power had been conferred without requiring any vote whatever. So that the real question is, whether what was done by the defendant city, as recited in the bonds, was the loan of its credit to the railway corporation within the meaning of the constitutional provision in this regard.

If the bonds in suit had been executed and delivered *directly* to the railroad company, as the consideration for its agreement to locate its machine shops within the town, then, on the only assumption on which the bonds can be sustained, viz., that such shops are part of the railroad, or necessary for its use, would not the execution and delivery of such bonds to the railway company be the loaning by the town of its credit to the company?

It is not different in essence, and particularly in view of the object of the constitution, viz., to prevent taxing the people without the required consent, that the town sells its own bonds and gives to the company the proceeds, instead of the bonds themselves.

The bonds in question, if valid, create a debt against the defendant city for the benefit of a railroad corporation, and are thus within the mischief or evil which the constitution aimed to remedy. Why, then, should not the constitutional provision be held applicable to these bonds? It cannot be maintained on solid grounds that the barrier of a two-thirds vote, weak and ineffectual as it has proved to be, can be evaded by a mere change of the form of the aid — that is, by giving the aid in the shape of a *donation* of the proceeds of credit, instead of a subscription for stock, or, instead, giving the bonds directly to the company which the municipality desires to assist.

In my judgment, a municipality "loans its credit" to a railway company, within the meaning of the constitutional provision here involved, whenever it issues its bonds to assist such company in building its road, or any part of it, or to assist it in erecting shops which are necessary or useful in operating its road. (*Taylor* v. *Ross County*, 23 Ohio St. 22, 76, 79; *Pennsylvania Railroad Co.* v. *Philadelphia*, 47 Pa. St. 189, 194.)

This view has a direct and strong support in the judgment of the supreme court of the state in the Phelps county case, con-

struing this constitutional provision (*State* v. *Curators of State University*, 57 Mo. 178). It was there held that the legislature could not authorize a county to issue its bonds to secure the establishment of a public school of mines within its limits, unless the proposition was assented to by a vote of two-thirds of the voters. NAPTON, J., delivering the opinion of the court, inquires: "What was the object of the [constitutional] restriction on county courts, city and town municipalities?" And he answers: "The object was plainly to prevent them from taxing the people without their consent." The subsequent case, in relation to Forest Park (*County Court* v. *Griswold*, 58 Mo. 175), is not considered by the supreme court as inconsistent with the Phelps county case, above referred to.

It is my judgment that the act under which the bonds in question were issued is in conflict with the constitution, and, hence, that the bonds are void, in whosesoever hands they may be. I should have so declared without much hesitation if the question had arisen on an application to enjoin the issue of the bonds. I feel the increased difficulty of so holding in a case where the bonds have been issued upon a vote almost unanimous and afterwards negotiated for value, and where purchasers in actual good faith will be the sufferers if my view is sustained. I desire to add that I am not insensible to the force of the argument so fully presented by Judge KREKEL in support of the opposite conclusion, and I cannot but feel more than the usual distrust of my own judgment when it differs from his on a question of local law, and particularly on a question as to the meaning of a provision of the constitution of the state which he, as the president of the convention, assisted to frame.

Fortunately, the result of this difference of opinion is that it will enable the judgment of this court to go for revision to the supreme court, which could not otherwise be done, in consequence of the amount involved not being sufficient.

The demurrer will be sustained, and judgment will be entered for the defendant. If desired, we will join in a certificate of division to the supreme court.

KREKEL, J., dissented.

JUDGMENT ACCORDINGLY.

Jarrott *v.* City of Moberly.

NOTE.—The following is the dissenting opinion of KREKEL, J.:

KREKEL, J.—Plaintiff, Jarrott, brings this action against defendant, the city of Moberly, to recover judgment on interest coupons detached from what are termed "Moberly machine shop bonds." The petition sets out a copy of the bonds, showing that the city of Moberly acknowledges itself indebted to W. F. Barrows or bearer in the sum of $500, in current funds, at the Bank of America, in the city of New York, ten years after date, with interest at ten per cent, payable annually, on presentation of coupons, with option on part of the inhabitants of the town of Moberly to pay the bonds after three years, and payable only by a special tax. The bonds on their face recite that they were issued in pursuance of an election held on the 6th day of March, 1872, to decide whether said town should purchase and donate to the St. Louis, Kansas City, and Northern Railway Company two hundred acres of land for machine shop purposes, the result of said election being two hundred and twenty-eight votes for and one vote against the purchase and donation; and in pursuance to the order of the board of trustees, made on the 18th day of April, 1872, which order was made in accordance with an act of the general assembly of the state of Missouri, entitled "An act authorizing cities and towns to purchase land, and to donate, lease, or sell the same to railroad companies," approved March 18th, 1870. The interest coupons are in the usual form.

The petition is demurred to, setting out for causes that from the petition it appears that the city council of Moberly had no authority in law to issue the bonds, the pretended act of the legislature under authority of which the bonds issued being unconstitutional, and because it appears that the legislature of Missouri exceeded its authority in the passage of said law.

The act, the constitutionality of which is thus brought in question, provides:

"SEC. 1. It shall be lawful for the council of any city, or the trustees of any incorporated town, to purchase lands, and to donate, lease, or sell the same to any railroad company, upon such terms and conditions as such board may deem proper, for the use of assisting and inducing such railroad company to locate and build machine shops or other improvements upon such lands, and for such purpose to levy taxes upon the taxable property of such city or town, and to borrow money and to issue the bonds of such city or town for such purpose: *Provided*, a majority of the qualified voters of such town or city, at a regular or special election to be held therein, shall assent to such purchase and donation.

"SEC. 2. At such election the poll-books shall be opened, and the ballots headed and styled 'for the purchase and donation' and 'against the purchase and donation,' and if a majority of the votes

cast shall be 'for the purchase and donation,' the proposition shall be deemed to be carried, and in that case the chairman of the board of trustees of any town, or the mayor of any town or city, is hereby authorized to receive and convey, on behalf of said town or city, said land as aforesaid."

The 3d section provides for the giving of notice "for at least two weeks before the terms of the contract to be so submitted as agreed upon between said railroad company and such common council or board of trustees."

It has been agreed that, for the purpose of this demurrer, all the requirements of the law had been complied with before the issuing of the bonds.

The constitutional provision, in violation of which the law quoted is claimed to have been passed, is found in paragraph 14, article 9, of the constitution of Missouri of 1865, and is in these words:

"SEC. 14. The general assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

This constitutional provision came up for consideration in the supreme court of Missouri in *State* v. *Curators of State University* (57 Mo. 178), in which the legality of certain bonds issued by the county of Phelps to obtain the location of the school of mines was contested, and it was held that the provision cited applied, and the issuing of the bonds was enjoined, because no vote had been taken. NAPTON, J., closes his opinion as follows: "It will be observed that this is a case in which the issue of bonds not authorized by the constitution is proposed to be arrested. When the proposed issue is not sanctioned by the requisite vote, we think it a suitable time to prevent the issue. After such bonds have been put upon the market, and purchasers have invested in them, the question of their validity depends upon essentially different principles." In the case before the court, we have a vote taken, the bonds have been put upon the market, and plaintiff is a purchaser of them for value. With these important differences between the cases, I feel free to consider the case before the court without that embarrassment which a difference of opinion with a court of such high standing, passing upon its own constitution, would create. The constitutional provision under consideration has a legislative history commencing with the act of January 27th, 1837, incorporating the Louisiana and Columbia Railroad. By the 16th section of that act, county courts were authorized to subscribe stock to the company and issue the notes of the county for such subscriptions, to be signed by all the justices and attested by the clerk, payable at such times and places as might be

agreed on. After such subscription, the justices had the right to vote the stock in elections of the company. In the charters afterwards granted to railroad companies, from time to time, by the legislature, this power to subscribe was embodied. No general railroad law was passed until 1853. The act of February 24th, of that year, in its 29th section, granted to the county court of any county, and the city council of any city, the power to subscribe to the capital stock of any railroad company organized under the act: "*Provided*, that the county court or city council subscribing or proposing to subscribe to such capital stock may, for information, cause an election to be held to ascertain the sense of the tax-payers of such county or such city as to such subscription, and as to whether the same shall be paid by issues of county or city bonds." The act authorizes the collection of taxes to pay subscriptions and the interest on bonds which may be issued.

These provisions, with the body of the law, passed into the revision of the Missouri statutes of 1855. In the Platte county case (42 Mo. 171), the supreme court of Missouri decided that this word "may" was obligatory, and must be read as "shall," holding bonds issued without submission void. The legislature soon after passed an amendatory act, by which the word *shall* is substituted for *may*.

The only constitutional provisions regarding internal improvements up to 1865 are found in the constitution of 1825, adopted soon after the admission of the state, and are as follows:

"ART. 7. Internal improvements shall forever be encouraged by the government of this state; and it shall be the duty of the general assembly, as soon as may be, to make provision by law for ascertaining the most proper objects of improvement, in relation both to roads and navigable waters; and it shall be their duty to provide by law for a systematic and economical application of the funds appropriated to those objects."

In 1846 a convention framed a constitution, which, on submission to the people for ratification, was rejected. This instrument made no mention of internal improvements.

The general corporation act of 1855, regarding the building of plank and macadamized roads, in its 34th section, authorized county courts to subscribe stock to the extent of one-half of the cost of constructing such roads. In no Missouri law or charter, not pertaining to rail, plank, or macadamized roads, is any authority found authorizing municipalities to subscribe stock, with or without submission.

The laws authorizing county courts to subscribe stock in the improvements mentioned remained dormant until the building of railroads, about the year 1850, actually began. The provisions were soon made available by the companies needing funds for their purposes. Desiring railroads, the people quietly stood by and acquiesced in the

exercise of the power by the county courts in subscribing stock. The legislative mind first perceived the danger; the requirement of submission in the acts of 1853 and 1855, the change of *may* into *shall* in 1860, the provision of the constitution of 1865 requiring a two-thirds vote, followed. These provisions undertook to keep pace with the rising railroad mania in Missouri.

Congress had made land grants, the state had aided certain railroads liberally, reserving for its security liens on the roads aided, which liens the companies interested sought to remove or subordinate to others. This was the condition of things in Missouri when the convention of 1865 framed the provision in alleged violation of which the act under which the "Moberly machine shop bonds" issued was passed. Let us now examine the provision itself, and seek from its language and import to ascertain whether applicable to the act claimed to be unconstitutional and void. The act, by its terms, seeks to enable cities and towns to purchase lands and donate, lease, or sell them to railroad companies for the purpose of inducing them to build machine shops, or other improvements, upon such lands, requiring a majority vote for sanction. The language of the constitution is: "The general assembly shall not authorize any county, city, or town to become a stockholder in or loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto." Did the city of Moberly, by the purchase of lands and donating them to the railroad company, become a stockholder in such company, or loan its credit to it? A stockholder in a railroad company may be said to be one who is interested in the funds of the company, and who assumes the liabilities of a stockholder. The city of Moberly, by virtue of its donation, certainly did not become interested in the funds of the company, nor did it assume any liability of the company—hence, did not partake of the character of a stockholder in any way. It cannot, by any possibility, be brought within the prohibitory language of the constitution, "shall not become a stockholder in any company."

Did it loan its credit to the railroad company? By making a donation it certainly did not loan its credit. But it is said that money was obtained on its bonds, in order to make the purchase of the land. Can this fairly be said to be a loan of credit to the company? I think not. Again, it is said that the constitutional provision is directed against the mischief, and that this case falls within it. And here is the real point in issue—what was, in the light of the legislation of Missouri and the condition of the state, the mischief at which the constitution aimed? Looking at the legislative history and the attending circumstances, the conclusion is, the improvident employment of community credit in railroad enterprises, in which they could have no other than a common interest, and could exercise, if any, but a very limited control.

The Phelps county case (57 Mo. 178) and the St. Louis county court case (58 Mo. 175) may be said, so far as the case under consideration is concerned, to fairly neutralize each other—the first with a leaning adverse to the view here taken, the latter favorable to it.

The constitutional provision under consideration is found in connection with and preceded by a prohibition regarding the state, as follows: "The credit of the state shall not be given or loaned in aid of any association or corporation; nor shall the state hereafter become a stockholder in any corporation or association." The credit of the state had before that time been given or loaned to various railroads, and the state was, in fact, at the time a stockholder in a bank, both of which connections had proven unprofitable, and against them the constitutional provision regarding the state was directed. Following this constitutional provision is found the one in reference to counties, cities, and towns, identical in language, adding the requirement of a two-thirds vote under which they might act in reference to the object named. Next comes the provision denying the legislature power to release the liens which the state had reserved on the railroads when providing for the loan of its credit to them; so that the loan of credit and becoming stockholders, both as affecting the state as well as local communities, was before the mind of the convention. No other matters, except those regarding internal improvements in the larger and extended sense, seem to have been thought of and considered. If the purchasing of property and the donation thereof for the purpose of inducing the location of machine shops, thereby securing a local benefit, had been intended to be prohibited, the word "donation" could easily have been added, as in the constitution of Illinois, which, with this exception, is identical regarding the subject matter. How the legislative mind of Missouri had run on this subject up to 1865, we have seen from what has been stated; how it has since run, the amendment of the act of 1870, requiring a majority only, and its change in 1872, making two-thirds the vote required, and the constitution of 1875, altogether prohibitory, would indicate. This prohibitory clause is as follows (section 6, article 9): "No county, township, city, or other municipality shall hereafter become a subscriber to the capital stock of any railroad or other corporation or association, or make appropriation or donation, or loan its credit in aid," etc. Thus, by apt words, appropriations or donations are prohibited. The conclusion reached is, that the law under which the "Moberly machine shop bonds" were issued does not conflict with the constitution of 1865, and is a valid act; that the prohibitions of the constitution were not directed against the purchase and donation of property for the purpose mentioned in the act. This being so, the legislature had the power to authorize the city of Moberly to issue its bonds on a majority vote.

Another objection to the validity of the "machine shop bonds" is,

that they were not issued for a public purpose. In the Fort Scott case (92 U. S. 503), bonds for similar improvements were held valid. The case of *Burlington* v. *Beasly* (94 U. S. 429) seems to extend and enlarge municipal power. Neither conflicts with the Topeka case, in which bonds were held void because issued to a private corporation, carrying on its own and exclusively private business. As remarked in one of the decisions of the supreme court of the United States, nearly all of the states have so legislated regarding railroads as to make them public corporations in the essential particulars affecting the interest of the community. State and federal courts have followed in the wake legislation has marked out. Machine shops are a legitimate and necessary part of a railroad, and partake with it of its public character; though they may be locally aided and established, this does not infringe upon or destroy their public character. In parenthesis, I may remark that this case presents, in some aspects, curious features as to legislative and judicial interpretations. The legislature passed the act of 1870, requiring a majority vote in case of donation, then amended it in 1872, requiring a two-thirds vote. The bonds in question upon their face recite that two hundred and twenty-eight votes were cast for and only one against the proposition, thus showing more than a full compliance with the acts of 1870 and of 1872, as well as with the constitutional provision requiring a two-thirds vote. To declare the law under which the bonds issued unconstitutional makes the bonds void, notwithstanding the recital of facts on the face of the bonds that more than the two-thirds required had voted for the issue.

Thus the spirit of the law is crushed in the form, and the law made to favor dishonesty rather than honesty. When such is the condition of things, I prefer resolving doubts in favor of the constitutionality of the act giving force to the law enacted by the legislature.

On the whole, I am of opinion the demurrer to the declaration should be overruled.

A writ of error was taken.

MERRIWETHER *v.* SALINE COUNTY.

1. The cases of *Foster* v. *Callaway County* (3 Dillon, 209) and *Sherrard* v. *Lafayette County* (*Ib.* 236) cited.
2. The bonds in suit, not being promises to pay money absolutely, are not negotiable, and are, therefore, open, in the hands of any holder, to defences which would have been available against the payee.
3. A *township* bond containing a statement that "it is to be converted into a *county* bond" whenever a certain injunction shall be finally

dissolved, and county bonds issued under the order enjoined, not being a promise to pay money absolutely, but a stipulation for bonds thereafter to be issued, is not negotiable in such a sense as to preclude the maker from defences, although it may be held by the plaintiff for value before due, and without actual notice of the maker's defences.

(*Before* DILLON and KREKEL, JJ.)

Township Bonds. — Act of March 23d, 1868. — Bonds not Unconditionally Payable, not Negotiable so as to cut off Defences.

ACTION on township bonds issued under the act of March 23d, 1868. The cause was submitted to the court on agreed facts. The questions involved appear in the opinion of the court.

T. K. Skinker, for the plaintiff.

Graves & Rathburn and *T. C. Fletcher*, for the defendant.

KREKEL, J. — This suit is brought on coupons detached from Saline county bonds, issued in payment of a subscription of Marshall township, in Saline county, to the capital stock of the Louisiana and Missouri River Railroad. A vote was had under the so-called township act of March 23d, 1868, and the requisite two-thirds vote of those voting was given in favor of the subscription, on certain conditions embodied in the order of the county court. Saline county, as such, prior to the subscription of Marshall township, had made a county subscription of $400,000 to the same railroad. This last subscription had been attacked for illegality in the circuit court of Saline county, and such proceedings were had in the case as resulted in perpetually enjoining the issuing of the bonds. The ground mainly relied on in opposition to the issuing of the bonds was the unconstitutionality of the amendment of the charter of the said railroad company of March 24th, 1868.

The original charter of the Louisiana and Missouri River Railroad Company, granted in 1859, and the several amendments thereto prior to the amendment of March 24th, 1868,

authorized the company to build a road from Louisiana, on the Mississippi river, to any point on the Missouri river, and authorized the counties along the line of the road to subscribe stock thereto, without having the question of subscription submitted, as required by the constitution of 1865. By the amendment of March 24th, 1868, the railroad company sought to obtain the privilege of extending their road across the Missouri river, and, at the same time, to have the provision regarding subscribing without submission granted to the counties along the line of the extension on the *south* side of the Missouri river.

Acting under the supposition that these powers had been granted by the amendment, the company applied for and obtained the subscription of $400,000 of Saline county, the issuing of the bonds for which was enjoined.

While the proceedings to enjoin were pending, the people of Marshall township, under the act of March 23d, 1868, petitioned the county court of Saline county to submit to the voters of Marshall township the question of subscribing $150,000 in aid of extending the road across the Missouri river, on the condition of building it to Marshall, the county seat of Saline county, and within Marshall township, and the further condition of establishing a depot within half a mile of the town of Marshall. Under this submission a vote was had, resulting in a two-thirds majority in favor of the subscription, and the bonds subscribed.

The constitutional power of the legislature of Missouri to grant powers such as are contained in the amendment of the charter of March 24th, 1868, as well as the negotiability of the bonds issued, are to be considered.

Regarding the constitutionality of the amendment of March 24th, 1868, these questions were raised in the supreme court of Missouri, namely: the right to amend the original charter so as to extend the road across the Missouri river; secondly, the granting of the power to subscribe without submission; thirdly, the failing to recite in the title the subject embraced in the act.

Upon two of these questions the supreme court of Missouri

has left us in doubt. On the question of the right to extend the road across the Missouri river, and the question of the title of the act, the judges were divided in opinion — the special judge called in deciding against the constitutionality of the amendment on both grounds, Judge WAGNER, in a dissenting opinion, reaching an opposite conclusion, and the third judge expressing no opinion. As may be seen in the case of *Foster* v. *Callaway County* (3 Dillon, 200), this court inclined to follow Judge WAGNER'S views on these questions. Upon the second question, "the granting of the power to subscribe without submission," all the judges agreed that the constitution of 1865 prohibited the legislature from granting such a power, and this court, in the case of *Sherrard* v. *Lafayette County* (3 Dillon, 236), followed that decision.

The so-called township act of March 23d, 1868, under the decision of *State* v. *Central Railroad Co.* (44 Mo. 504), and cases since, has been treated by this court as constitutional, the question of its constitutionality never having been directly raised; yet it must be confessed that the intimations in the *Harshman* v. *Bates County* case look to a different view. The doubt will soon be solved, as in some of the cases now pending before the supreme court of the United States the question is directly made.

Assuming the so-called township act of March 23d, 1868, to be constitutional, and the grant of power to extend the railroad across the Missouri river by the amendment of the charter of the company by the act of March 24th, 1868, as within legislative authority, we would hold bonds, so far as these questions are concerned, in conformity to decision rendered by this court prior to the decision of the *Harshman* v. *Bates County* case. If the views expressed in the latter case shall be maintained, they would control this case. The question of negotiability and consequent notice remains to be considered.

The Marshall township bonds read as follows:

"*United States of America, State of Missouri.*
"*Saline County Bond.*

"No. 3; Class 'A'; nine years; $100; interest ten per centum per annum.

"Know all men by these presents, that, on the 1st day of January, A. D. 1880, the county of Saline, in the state of Missouri, promises to pay to the Louisiana and Missouri River Railroad Company, or bearer, the sum of one hundred dollars, at the Bank of America, in the city and state of New York, together with interest at the rate of ten per centum per annum, payable at the said Bank of America on the 1st day of January of each year, on the presentation and delivery of the annexed coupons of interest as they severally become due. This bond is issued in part payment of a subscription of one hundred and fifty thousand dollars made by Marshall township to the capital stock of the Louisiana and Missouri River Railroad Company, pursuant to an order of the county court of Saline county made on the 7th day of September, 1870, and is to be converted and exchanged for bonds of the county of Saline whenever the injunction now covering the subscription of four hundred thousand dollars made by the county court of said county on the 7th day of February, 1868, to said Louisiana and Missouri River Railroad Company shall be finally dissolved, and bonds issued under said order. In testimony whereof," etc.

The $400,000 of Saline county bonds referred to on the face of these Marshall township bonds were never issued, but their issue was enjoined, as stated. It would seem that the recital in the bond sued on, that it "is to be converted and exchanged for bonds of the county of Saline whenever the injunction now covering the subscription of $400,000 made by the county court of said county on the 7th day of February, 1868, to the Louisiana and Missouri River Railroad Company shall be finally dissolved, and bonds issued under said order," quite clearly expresses the intention of the parties. It is not a promise to pay money absolutely, but a stipulation for bonds thereafter to be issued. Nor does the promise to pay, the manner in which pay-

ment is to be made, or the form of the bond, militate against this view, for all of this may well have been set out as indicating the terms and conditions of the new bond thereafter to be issued.

The bonds not being negotiable, notice as to the conditions upon which they were issued attaches. And here we find, from the order of the county court of September 7th, 1870, recited in the bond, and the agreed statement of facts, that they were issued, among others, on the condition that the said road should be graded from the point of crossing the Missouri river to the town of Marshall, and that a permanent depot be established within half a mile of the town of Marshall. The presumption arising from the issuing of said bonds as to the compliance of the conditions on which they were issued is relied on as showing that they were properly issued; and this would be the case were the bonds negotiable and in the hands of innocent holders. The object in making the subscription and issuing the bonds was to aid in the construction of a railroad to the town of Marshall, the county seat of Saline county, and not the having some valueless work done thereon, not accomplishing the object. The building of the railroad, as shown by the agreed facts, has been abandoned, and thus the object of the subscription and the issuing of the bonds defeated. The consideration for which the bonds were issued having failed, the coupons thereof constitute no legal obligation to pay. Judgment is therefore rendered for defendant.

JUDGMENT ACCORDINGLY.

NOTE.—Subsequently, at the April term, 1879, the question of the validity of the bonds of the defendant county arose on a demurrer to the answer in the case of *Caleb Pepper* v. *Saline County*, and the following opinion was given by KREKEL, J.:

Thomas K. Skinker, for the plaintiff.

Graves & Rathburn and *Thomas C. Fletcher*, for the defendant.

KREKEL, J.—This suit is brought on coupons detached from bonds issued in payment of a subscription by Marshall township, in Saline county, to the capital stock of the Louisiana and Missouri River Rail-

road. A vote was had under the so-called township act of March 23d, 1868, and the requisite two-thirds vote of those voting was given in favor of the subscription, on conditions embodied in the order of the county court.

Saline county, as such, prior to the subscription of Marshall township, had made a county subscription of $400,000 to the same railroad. This last subscription had been attacked for illegality in the circuit court of Saline county, and such proceedings were had in the case as resulted in perpetually enjoining the issuing of said bonds. The grounds mainly relied on in opposition to the issuing of the bonds by Saline county was the unconstitutionality of the amendment of the charter of the company of March 24th, 1868.

The original charter of the Louisiana and Missouri River Railroad Company, granted in 1859, and the several amendments thereto prior to the amendment of March 24th, 1868, authorized the company to build a railroad from Louisiana, on the Mississippi river, to any point on the Missouri river, and authorized the counties along the line of the road to subscribe stock thereto without having the question of subscription submitted, as required by the constitution of 1865. By the amendment of March 24th, 1868, the railroad company sought to obtain the privilege of extending their road across the Missouri river, and, at the same time, to have the provision in regard to subscribing without submission granted to the counties along the line of the extension, on the south side of the Missouri river.

Acting on the supposition that these powers had been granted by the amendment, the company applied for and obtained the subscription of $400,000 of Saline county, the issuing of the bonds for which was enjoined.

While the proceedings to enjoin were pending, the people of Marshall township, under the act of March 23d, 1868, petitioned the county court of Saline county to submit to the voters of Marshall township the question of subscribing $150,000 in aid of extending the road across the Missouri river, on the condition of building it to Marshall, the county seat of Saline county, and within Marshall township, and the further condition of establishing a depot within half a mile of the town of Marshall. Under this submission a vote was had, resulting in a two-thirds majority in favor of the subscription, and the bonds in controversy were issued to pay the same.

The questions to be determined are: First, the constitutionality of the amendment of March 24th, 1868, by which the Louisiana and Missouri River Railroad was extended across and on the south side of the Missouri river; second, the granting of the power to subscribe by the counties on the extension without submission; third, the failing to recite in the title the subject embraced in the act; and, lastly, the negotiability of the bonds.

On the question of power by the legislature to extend the road across the Missouri river, and the question of the title of the act, the Missouri judges in the cases of *State* v. *Saline County* (51 Mo. 350) and *State, ex rel. etc.* v. *Callaway County* (51 Mo. 350) were divided in opinion—the special judge called in deciding against the constitutionality of the amendment on both grounds, Judge WAGNER, in a dissenting opinion, reaching an opposite conclusion, and the third judge offering no opinion. (See case of *Foster* v. *Callaway County*, 3 Dillon, 200.) This court, in the Callaway case cited, coincided with Judge WAGNER, and this view was sustained by the supreme court of the United States on appeal. Upon the second question—the granting of the power to subscribe without submission to a vote on the extended line—all the Missouri judges agreed that the constitution of 1865 prohibited the legislature from granting such a power, and this court, in the case of *Sherrard* v. *Lafayette County* (3 Dillon, 236), followed that decision. The so-called township act of March 23d, 1868, under the decision of *State* v. *Central Railroad Co.* (44 Mo. 504), and cases since, has been held constitutional by this court, and is now so held by the supreme court of the United States (*County of Cass* v. *Johnston*, 95 U. S. 360). The grant of power to extend the Louisiana and Missouri River Railroad across the Missouri river by the amendment of the charter of the company by the act of March 24th, 1868, having been held within legislative authority, we deem the bonds, so far as the questions are concerned, valid. The question of negotiability and consequent notice remains to be considered. The Marshall township bonds read as follows:

"*United States of America, State of Missouri.*
"*Saline County Bond.*

"No. 3; Class 'A'; nine years; $100; interest ten per centum per annum.

"Know all men by these presents, that, on the 1st day of January, A. D. 1880, the county of Saline, in the state of Missouri, promises to pay to the Louisiana and Missouri River Railroad Company, or bearer, the sum of one hundred dollars, at the Bank of America, in the city and state of New York, together with interest at the rate of ten per centum per annum, payable at the said Bank of America on the 1st day of January of each year, on the presentation and delivery of the annexed coupons of interest as they severally become due. This bond is issued in part payment of a subscription of one hundred and fifty thousand dollars made by Marshall township to the capital stock of the Louisiana and Missouri River Railroad Company, pursuant to an order of the county court of Saline county made on the 7th day of September, 1870, and is to be converted and exchanged for bonds of the county of Saline whenever the injunction now covering the subscription of four hundred thousand dollars made by the county court

of said county on the 7th day of February, 1868, to said Louisiana and Missouri River Railroad Company shall be finally dissolved, and bonds issued under said order. In testimony whereof," etc.

Do the conditions and contingencies set out in the bond, that on the happening of the dissolution of the injunction (an event apparently anticipated) bonds of the county of Saline should be issued in lieu of those in suit, destroy their negotiability?

The case of *Vermilye* v. *Adams Express Co.* (21 Wall.) is relied on by both parties. The negotiability of certain treasury notes was in controversy. Upon the back of them the following statement was printed: "At maturity convertible, at the option of the holder, into bonds redeemable at the pleasure of the government at any time after five years, and payable twenty years from June 15th, 1868, with interest at the rate of six per cent per annum, payable semi-annually, in coin." Justice MILLER, delivering the opinion of the court, said: "They had the ordinary form of negotiable instruments, payable at a definite time. * * * The fact that the holder had an option to convert them into other bonds does not change their character. That this option was to be exercised by the holder, and not by the United States, is all that saves them from losing their character as negotiable paper; for if they had been absolutely payable in other bonds, or in bonds or money, at the option of the maker, they would not, according to all the authorities, be promissory notes, and they can lay claim to no other form of negotiable instrument."

What saved them, according to this authority, from losing their character as negotiable paper, was that the option to convert them into bonds remained to be exercised by the holder. In the case before us, the stipulation on the face of the bond is that they are to be converted and exchanged for bonds of the county of Saline. Converted and exchanged. Converted — that is, to be changed to something else; and then to be exchanged — that is, to be substituted for the converted bonds. This right and obligation to convert and exchange the maker of the bond stipulates for. In the conversion the county of Saline is to be made the payee. The maker stipulates for the conversion and exchange in this case — the very condition which, according to Justice MILLER, destroys their negotiability. Judge CATRON, in the case of *United States* v. *Bank of the United States* (16 Curtis, 433), says: "A bill of exchange is an instrument governed by the commercial law; it must carry on its face its authority to command the money drawn for. * * But if no demand can be made on the bill standing alone, and it depends on other papers or documents to give it force and effect, and these must necessarily accompany the bill, it cannot be a simple bill of exchange, that circulates from hand to hand, or the representative of current cash." The bonds in controversy are encumbered with condi-

tions and contingencies, and are therefore not negotiable, and if negotiated, are subject to the same defences they would have been subject to in the hands of the original owners. The conditions and contingencies set out on the face of the bond may be said to have been notice that the bonds sued on were not to be treated as negotiable paper, and ought to have made commercial men reluctant to touch them. (*Overton* v. *Tyler*, 3 Pa. St. 346.)

If, by reason of the conditions and contingencies, the bonds were not negotiable when they were issued, no subsequent circumstances could render them negotiable. (*Tindall's Executor* v. *Johnston*, 1 Hayw. [N. C.] 372; *Campbell* v. *Mumford*, *Ib.* 398; *Thompson* v. *Gaylard*, 2 *Ib.* 150.) These cases dispose of the argument that the conditions and stipulations in the bond having become impossible of performance, are to be disregarded and treated as of no effect.

The defences set up in the several counts of the answer to which the demurrer is filed are as follows: The ordinances of September 7th, 1870, referred to in the bonds, contained, among others, the condition "that said subscription shall be paid in bonds, to be issued in sums of not less than $100 nor more than $5,000, each of said bonds to bear interest at the rate of ten per cent per annum, the interest to be paid annually, on the 1st day of January of each year, at the Bank of America, in the city of New York, and to become due and payable as follows: Class 'A,' the sum of $40,000, to become due on the 1st day of January, 1880; class 'B,' the sum of $50,000, to become due on the 1st day of January, 1885; class 'C,' the sum of $60,000, to become due on the 1st day of January, 1890; and that said bonds should be delivered to said railroad company, commencing with class 'A,' the sum of $20,000 when the said road shall be put under contract from the Missouri river to the town of Marshall, and work commenced in good faith; the remaining $20,000 when two miles of said road shall be graded within the limits of Saline county. Class 'B,' the sum of $25,000 when six miles of said road shall be graded within said limits of Saline county; and the further sum of $25,000 when ten miles of said road shall be graded within said county. And the sum of $30,000, class 'C,' when fifteen miles of said road shall be graded within the limits of said county; and the further sum of $30,000 of said class 'C' when the road-bed on all of the part of said road between the town of Marshall and the Missouri river shall be finished and ready for the iron."

The bonds being held non-negotiable, the facts set out in the second count of defendant's answer, going to the consideration of the bonds, on account of failure to comply with the conditions on which they were issued, are a proper defence, and the demurrer thereto must be overruled.

JUDGMENT ACCORDINGLY.

UNITED STATES *v.* CHARLES B. WILKINSON and THE BANK OF ST. JOSEPH.

1. Under the legislation of congress (Rev. Stats. secs. 3466, 3467), the priority of the United States as a creditor is secured only when by law or the act of the debtor his property is attached, sequestered, or being administered for the benefit of his creditors generally.
2. The attachment mentioned in the foregoing section is not such an attachment as is authorized by the laws of Missouri, which is for the exclusive benefit of the creditor who makes the attachment.

(*Before* KREKEL, J.)

Revised Statutes, Sections 3466 and 3467, Construed.—Priority of the United States as a Creditor.

THIS is a bill filed by the United States against Charles B. Wilkinson and the Bank of St. Joseph, alleging that said Wilkinson, from the year 1872 to 1875, was internal revenue collector for the sixth collection district of Missouri; that as such collector he became indebted to the United States in the sum of $8,357.31; that the United States, on the 30th of March, 1876, recovered judgment for said amount, which judgment remains unsatisfied; that in September, 1875, said Wilkinson was the owner of a large amount of property (described in the bill); that about the date last aforesaid he fled the country; that the Bank of St. Joseph instituted suit by attachment in the state court, attaching all the property of said Wilkinson and garnishing his debtors; that, under the judgment obtained, said Bank of St. Joseph sold all of the property attached and became the purchaser thereof. The prayer of the bill is to declare the bank trustee and direct it to pay over the funds in order to satisfy the debt of the United States.

The bill is demurred to.

Botsford & Williams and *Mr. Waters*, for the United States.

Willard P. Hall and *Franklin Porter*, for the defendant.

KREKEL, J.—The legal question raised may be considered under the first cause assigned in the demurrer, "that the bill does not state a cause of action against the defendant bank."

The right of recovery on part of the United States is based upon section 3466 of the Revised Statutes of the United States, which is as follows: "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor in the hands of the executors or administrators is insufficient to pay all the debts due from the deceased, the debts due the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor not having sufficient property to pay all his debts makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed." See, also, Revised Statutes, section 3467.

It would appear that the priority provided for applies and extends to cases only in which the estate of the debtor passes from him or is administered for the benefit of his creditors. (Burrill on Assignments, p. 534, and cases cited.) An insolvent estate is so administered. The administrator or executor deals with the assets of the estate for the benefit of creditors in the first instance. An assignment made voluntarily brings the property to be administered into the same category. Thus far there is no difficulty in ascertaining the meaning and intent of the law securing the preference. The clause affecting the estate and effects of an absconding debtor when attached by process of law, presents the real difficulty.

We have two classes of attachment in the United States; in the one the effect is to vest the property of the debtor in trustees for the benefit of all the debtor's creditors; in the other class (as in Missouri) the attachment is for the exclusive benefit of the attaching creditor.

In New York, New Jersey, Delaware, and Pennsylvania, the property of absconding and concealed debtors, when attached, passes into the hands of trustees, to be administered for the

benefit of the whole of the creditors. The provision of the United States statutes uses the words "absconding, concealed, and absent debtor," and it is a reasonable construction to say the attachments spoken of refer to the class of attachments in the states named. This has been so held. (1 Kent's Commentaries, 247, side page and notes; *United States* v. *Clark*, 1 Paine, 639; *Smith* v. *Tinker*, 2 Day, 241; *McLean* v. *Rankin*, 3 Johns. Ch. 369; *United States* v. *Cruikshank*, 3 Edw. Ch. 233; *Johnson* v. *Hunt*, 23 Wend. 87, 89; *Plunkett* v. *Moore*, 3 Harr. [Mich.] 380; *Cummings* v. *Blair*, 3 Harr. [N. J.] 152; *Bouchaud* v. *Dias*, 1 Comst. 204; Burrill on Assignments, 534; *Field* v. *United States*, 9 Pet. 201; *United States* v. *Fisher*, 2 Cranch, 390, note; *United States* v. *Mott*, 1 Paine, 201; *United States* v. *Hooe*, 3 Cranch, 87; *Conrad* v. *Insurance Company*, 1 Pet. 439, 440; *Watkins* v. *Otis*, 2 Pick. 101, 102; Drake on Attachment, secs. 644, 668, 673.)

The effect of an attachment in Missouri is to secure to the attaching creditor a conditional lien, which may be perfected by a judgment, and affects the property attached only, and does not affect the interest of any other than the attaching creditor in any way. The fact that the St. Joseph Bank attached all the property of Wilkinson — the defaulter — cannot alter the case or change the effect of the law. The attaching bank, under the laws of Missouri, was the only party interested, both as a creditor and as regards the property attached.

The next section of the Revised Statutes after the one quoted supports this view. That section provides that "every executor, administrator, or assignee, or other person who pays any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debts due the United States," shall become personally answerable in his own person and estate for the debts due to the United States. The class of persons here referred to is evidently a class acting as trustees in some capacity, and not for themselves. Reading this provision thus, it harmonizes with the construction given to the attachment referred to in section 3466.

In considering the question at issue, it may not be improper to ask: Does the priority secured to the United States so impress itself upon the property as to create a lien, subject to which the Bank of St. Joseph acquired the property of the defaulting debtor, Wilkinson? If it did, then every person dealing with one who is or may become indebted to the United States does so at his peril. All property of a debtor of the United States would be affected by possible liens, the existence and extent of which no one could well ascertain. The question of such implied lien in favor of the United States has been considered by commentators and courts. Chancellor KENT (1 Commentaries, side page 245, citing *United States* v. *Hooe*), says that it was there held "that the priority to which the United States were entitled did not partake of the character of a lien on property of the public debtor. The United States, in the character of a creditor, have no lien on the real estate of their debtor. If the priority existed from the time the debt was contracted, and the debtor should continue to transact business with the world, the inconvenience would be immense. The priority only applied to cases where the debtor had become actually and notoriously insolvent, and, being unable to pay his debts, has made a voluntary assignment of all his property, or, having absconded or absented himself, his property had been attached by process of law." In the case of *Prince* v. *Bartlett*, 8 Cranch, 431, it was decided "that the effects of an insolvent debtor duly attached in June were considered not liable to the claim of the United States on a custom-house bond given prior to the attachment and put in suit in August following. The private debtor had acquired a lien by his attachment which could not be divested by process on part of the United States subsequently issued. (*Beaston* v. *The Farmers' Bank*, 12 Pet. 102.)

Under the views expressed, no lien in favor of the United States on account of preference existed at the time the sheriff of Buchanan county seized the property afterwards sold under execution on judgment in favor of the bank obtained in the attachment suit. The property being free of liens, the bank buying

it thereby incurred no liability to the United States, and holds the property free of any claim of the United States.

The judgment of the court is that the demurrer be sustained and the bill dismissed.

DECREE ACCORDINGLY.

NOTE. — In *United States* v. *Cook County Bank*, Mr. Justice HARLAN (circuit court for northern district of Illinois, 25 Int. Rev. Rec. 266, 1879), construing the legislation of congress applicable to the question (Rev. Stats. secs. 3466, 3467, 5236), held that the United States government has a prior lien over other creditors on the proceeds of the sale of bonds deposited as security for the circulation of national bank bills, as well as a prior claim in the distribution of the bank's assets, for the payment of claims of the government against such bank, and may apply the proceeds of such assets to the payment *pro tanto* of its claim for postal funds and money order funds deposited in such bank by the postmaster.

In giving his opinion, Mr. Justice HARLAN said: "Very early in the history of the government it was provided by statute that debts due the United States should be first satisfied in all cases where any revenue officer, or other person, thereafter becoming indebted to the government, by bond or otherwise, should become insolvent, or where the estate of any deceased person in the hands of executors or administrators should be insufficient to pay all the debts due from the deceased. The priority thus established was declared to extend not only to cases in which an act of legal bankruptcy should be committed, but to cases in which a debtor, not having sufficient property to pay all his debts, should make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor should be attached by process of law (act of March 3d, 1797, 1 Stats. 515). That was an act providing more effectually for the settlement of accounts between the United States and receivers of public money, but it was held to include all debtors to the United States, whatever their character and by whatever mode bound (*United States* v. *Fisher*, 2 Cranch, 358; *Beaston* v. *The Farmers Bank*, 12 Pet. 102). In the act of March 2d, 1799, regulating the collection of duties on imports, a like priority was given to the government as to the claims upon bonds given for the payment of duties (1 Stats. 676; act of 1790, 1 Stats. 169). The policy inaugurated by these statutes seems to have been steadily maintained by the government. Their substantial provisions have been preserved in the authorized revision of the statutes (Rev. Stats. sec. 3467, *et seq*).

"It is insisted, however, by the defendants, that a different rule must be observed in the distribution of the assets of an insolvent national bank in charge of a receiver appointed by the comptroller of the cur-

rency. They assume that the national bank act of 1864, the provisions of which are preserved in the revised statutes, placed all the creditors of a suspended national bank upon an equal footing, except that for any deficiency in the proceeds of the sale of United States bonds pledged to secure the circulation of such bank, but for no other purpose, the government is given 'a first and paramount lien upon all the assets of such association,' and to that extent, and no farther, it is entitled, in the distribution of assets, to priority above all other creditors (13 Stats. 114).

"This position, it is earnestly claimed, is sustained by section 50 of the act of 1864 (Rev. Stats. sec. 5236).

"The specific contention is, that these provisions of the national bank acts operate as a repeal or modification, *pro tanto*, of the statutes which give the government a priority in the distribution of the estates of those indebted to it.

"We cannot yield our assent to any such construction of the statutes in question. The authorities cited by the learned counsel do not, as we perceive, justify the conclusion for which they contend. They only announce the general rule, recognized in all the books, 'that a subsequent statute which is clearly repugnant to a prior one, necessarily repeals the former, although it does not do so in terms; and, even if a subsequent statute be not repugnant in all its provisions to a prior one, yet, if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the former act, *leges posteriores contrarias abrogant.*' * * * * * * *

"It is admitted by learned counsel that before the passage of the act of 1864, the government had a priority in all the cases specified in the acts of 1797 and 1799, whether the debtors were individuals or corporations. It is also admitted that such priority now exists, except in the cases of national banks for whom receivers have been appointed. But no sound reason has been assigned for a distinction in behalf of the general creditors of national banks, which, counsel concede, is not allowed in behalf of the creditors of other corporations, by whatever authority created, and which are indebted to the United States. The words of the statute are broad, that 'whenever *any* person indebted to the United States is insolvent, * * the debts due to the United States shall be first satisfied.' The defendant bank is, therefore, embraced by the express language of the statute. The same considerations of public policy which suggested the act of 1797 exist now, as well as when the act of 1864 was passed, and there is no such irreconcilable inconsistency between the two acts, or between the several provisions of the revised statutes upon the same subject, as requires us to assume that congress intended by the last statute to surrender the government's priority in any case covered by the prior statute. The two acts may well exist together."

ELISHA FOOTE v. JOHNSON COUNTY.

1. The supreme court of the United States having held the "township railroad aid act" of Missouri constitutional (*Cass County* v. *Johnson*, 5 Cent. Law Jour. 506), it is the duty of the circuit court to follow that judgment, notwithstanding the later decision of the supreme court of Missouri in the *State* v. *Brassfield*.
2. Where negotiable commercial securities are issued and negotiated *before* there is any decision by the courts of the state against the validity of the act authorizing their issue, the supreme court of the United States does not consider itself bound to follow a *subsequent* decision of the local courts invalidating such securities, but will decide for itself whether, under the constitution and laws of the state, such securities are valid or void.

(*Before* DILLON and KREKEL, JJ.)

Municipal Bonds.—Missouri Township Railroad Aid Act.—Conflicting Decisions of State and Federal Courts.

THIS is an action against the county of Johnson upon bonds of the county, dated February 1st, 1871, issued in the name of the county, in behalf of Warrensburg township, under the "township aid act" of March 23d, 1868. (Laws 1868, p. 92; Wag. Stats. p. 313.)

The defendant demurs to the petition on the ground that the said act is unconstitutional, null, and void.

John B. Henderson, for the plaintiff.

Thomas C. Reynolds, for the defendant.

DILLON, *Circuit Judge*.—This is an action against the county on what are known as township bonds, issued under the "township aid act" of March 23d, 1868. A demurrer to the petition presents the question whether that act is in conflict with section 14, article 11, of the state constitution of 1865.

The ground of alleged conflict is that the act authorizes the issue of bonds in aid of a railroad when the proposition is sanctioned by "two-thirds of the qualified voters of the township

voting at the election," whereas the constitution requires such a proposition to be assented to by "two-thirds of the qualified voters of the township."

In *Harshman* v. *Bates County* (92 U. S. 569, s. c. below, 3 Dillon, 150), the supreme court of the United States held that the act was in conflict with the constitution, on the ground above mentioned. But, subsequently, after a thorough argument and the most deliberate consideration, the supreme court of the United States, in *Cass County* v. *Johnson* (5 Cent. Law Jour. 506), overruled its judgment in *Harshman* v. *Bates County* on the point in question, and, upon a full examination of all the decisions of the supreme court of Missouri touching the township aid act, declared, in respect of bonds already issued, that those decisions settled the question of the constitutionality of that act in favor of its validity. Particular stress was laid upon the Linn county case (44 Mo. 504, A. D. 1869), in which the supreme court of Missouri, by *mandamus*, compelled a reluctant and opposing county court to issue bonds upon a subscription made pursuant to a vote under the very statute here in question. Mr. Chief Justice WAITE, after referring to the Missouri decisions, says: "It is true that the objection now made to the law was in no case presented or considered [by the supreme court of Missouri], but this is sufficiently explained by the fact that in other cases a construction had been given to language similar to that employed in the constitutional prohibition adverse to such a position;" and the chief justice refers to *State* v. *Winkelmeier* (35 Mo. 103, 1864), *State* v. *St. Joseph* (37 Mo. 270, 1866), *State* v. *Binder* (38 Mo. 450, 1866), and *State* v. *Sutterfield* (54 Mo. 391).

This line of decisions in Missouri, in our judgment, fully justifies the chief justice in stating that they sufficiently explain why the specific objection now urged to the act of 1868 was not presented in any court until it was presented to the supreme court of the United States in the Harshman case, at the October term, 1875. The report shows that it was not made in the circuit court (*Harshman* v. *Bates County*, 3 Dillon, 150).

Suits in great numbers on these township bonds have been brought in the circuit court of the United States for this district, and they have been defended by the ablest lawyers in the state, upon every ground that they conceived open to them (*Jordan* v. *Cass County*, 3 Dillon, 185); but this difference between the phraseology of the constitution and the act, so patent that it could not escape attention, was never presented or urged in any case, so far as either of us recollect, as invalidating the act. The only explanation for this silence on the point in the state and federal courts is to be found in the Missouri decisions referred to by the chief justice.

But it is urged that whatever doubt there might heretofore have been touching the validity of the township bond act, the question of its unconstitutionality is now settled adversely to the act by the case of *State, ex rel. Woodson*, v. *Brassfield*, decided by the supreme court of Missouri on the 16th day of the present month (April, 1878).

We have been furnished with the opinions of the judges in the case referred to, and have read them with attention. Only three judges took part in the decision. Two of them (HENRY and SHERWOOD, JJ.) hold the act unconstitutional, and one (HOUGH, J.) was of the opinion that the objectionable words, "voting at such election," could be eliminated from the act, and thus relieve it of the constitutional objection. NAPTON, J., though not sitting in the case, filed a brief opinion, stating his concurrence in the opinion of Chief Justice WAITE in the case of *Cass County* v. *Johnson*. NORTON, J., having been of counsel, did not sit.

There is, therefore, no judgment of the majority of the judges of that learned court that the act of 1868 is unconstitutional. It is the duty of this court, then, to follow the judgment of the supreme court of the United States. But even if the supreme court of Missouri had, in its recent judgment, for the first time pronounced the act of 1868 unconstitutional, it is our judgment that in this class of cases the supreme court of the United States, as to bonds antecedently issued, would not, under the circum-

stances, feel itself bound to change its decision to conform to the decision of the supreme court of the state.

The supreme court of the United States considers questions arising upon negotiable municipal bonds issued under state authority to relate to commercial securities, and not to present questions of mere local law; and where such securities have been issued before any decision of the state tribunals denying the validity of the act authorizing the issue, the supreme court has declared that in protecting the constitutional rights of creditors it will decide for itself whether, under the constitution and laws of the state, such securities are valid or void (*Township of Pine Grove* v. *Talcott*, 19 Wall. 666; *Olcott* v. *Supervisors*, 16 Wall. 678). The cases last cited related to bonds which had been issued under acts which had been declared unconstitutional by the supreme court of Michigan in the one case, and by the supreme court of Wisconsin in the other, *after* the bonds in question had been issued. The duty of the supreme court of the United States to follow the judgment of the supreme court of the state was strongly urged by counsel. But the supreme court was of a different opinion, and in the case first cited Mr. Justice SWAYNE expresses the views of the court on the subject in language so emphatic and decisive as not to be mistaken. He says:

"The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the states where the cases arise. It must hear and determine for itself. Here commercial securities are involved. When the bonds were issued there had been no authoritative intimation from any quarter that such statutes were invalid. The legislature affirmed their validity in every act by an implication equivalent in effect to an express declaration; and during the period covered by their enactment neither of the other departments of the government of the state lifted its voice against them. The acquiescence was universal. The general understanding of the legal profession throughout the country is believed to have been that they were valid. The national constitution forbids the states to pass laws impairing the

obligation of contracts. In cases properly brought before us, that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the courts of the respective states, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery." (See, also, *Gelpcke* v. *Dubuque*, 1 Wall. 175, 205, 206; *Butz* v. *Muscatine*, 8 Wall. 575.)

This court must, therefore, hold the act of March 23d, 1868, to be constitutional, in conformity to the opinion of the supreme court of the United States. The demurrer to the petition is accordingly overruled.

KREKEL, J., concurs. JUDGMENT ACCORDINGLY.

UNITED STATES, *ex rel.* HUIDEKOPER, *v.* BUCHANAN COUNTY.

1. A judgment of the court upon the bonds of the county issued in aid of a railroad company may be enforced by a *mandamus* to compel the levy and collection of taxes; or, if the amount is already in the county treasury, applicable to such debts, to compel the county court to draw a warrant to pay the judgment. (See, also, cases in note.)
2. Such a duty is not judicial. (*State* v. *Walker* commented on.)
3. Where two out of three judges of the county court refused to obey a peremptory writ of *mandamus*, they were ordered to return the writ into court, with a sworn return thereon, and also to show cause why they should not be attached for contempt.

(*Before* DILLON and KREKEL, JJ.)

Municipal Bonds.—Enforcement of Judgment.—Mandamus Lies to County Court to Levy Taxes or Draw a Warrant to Pay Judgment on such Bonds.

THE relator, Huidekoper, a judgment creditor of the county of Buchanan, a majority of whose county justices had refused to

obey a writ of *mandamus* from this court, or to make any return thereof, moved for an order that the respondents, the county judges, be peremptorily commanded to return the writ, with a return thereon, and to show cause why they should not be attached for contempt. At the November term, 1878, counsel appeared for the respondents, and in argument denied the power of this court to issue, in such cases, a writ of *mandamus* to the judges of the county court, relying upon the recent decision of the supreme court of Missouri in *State* v. *Walker*. The circuit judge delivered orally the opinion of the court.

Mr. Shippen, for the relator.

Mr. Chandler, for the respondents.

DILLON, *Circuit Judge*.—The relator, a holder of bonds of Buchanan county, brought suit some years ago, in this court, upon coupons. The defendant resisted, but the plaintiff recovered judgment. The county never sought to have the judgment reviewed by the United States supreme court, but acquiesced therein. The case is reported in 3 Dillon, page 175. Subsequently it levied taxes to pay interest, and did pay some interest on the same issue of bonds. It levied a special tax for the purpose, and it is alleged without denial that there is about $45,000, the produce of this special tax, now in the county treasury, applicable to these debts. There it lies, liable to be lost, and doing no good. The debt, however, stands here uncontested, accumulating with interest and costs. The relator, having recovered another judgment, filed an information for a *mandamus* last July, stating these facts, and asked that the judges of the county court be required forthwith to pay or cause to be paid out of this fund the amount of this judgment. The peremptory writ was granted upon due notice, and made returnable on the first Monday of September last. The writ was duly served in July on each of the three judges of the county court. One judge returns that at a meeting of the county court he was ready and willing to obey, but the other two judges refused. The

other judges make no return, but come at this time by counsel and move to arrest these proceedings, on the ground of there being no authority in this court to maintain them. This is based in argument on a recent decision of the supreme court of Missouri in the case of *State* v. *Walker*, published in the Central Law Journal of November 15th, 1878, wherein it is said that it is not competent for a court to issue its command to a county court to issue a warrant to pay a judgment. Clearly that part of the decision was not essential to the case before that court. Anterior to judgment, a county court cannot be compelled by *mandamus* from this court to approve a claim. Passing thereon is a judicial act. But the law authorizes a county court to be sued; and when it comes and is heard by a court of competent jurisdiction, and a judgment is rendered against it, a solemn conclusion is reached. The claim is then judicially audited, and it is the duty of the county court to take the proper steps for its payment. Such is the duty of the county court, no less than of an individual against whom a judgment is rendered. But if a county court fails to do its duty, is that the end of the creditor's rights? Must he go to the county court and say, "Here is a United States circuit court judgment; please audit it?" And if it will not, must he appeal to the circuit court of that county, and thence, if the decision be against him, to the state supreme court? Thus, litigation begun in the federal court would end in the supreme court of the state, instead of the United States supreme court. Such is the inevitable result of the views the respondents have so zealously pressed upon us. The non-resident creditor has a right, under the constitution and laws of the United States, to bring his action in the federal courts. Nothing can be imputed to him if he avails himself of such a right, nor is any reflection whatever cast thereby on the state courts. Such is not the basis of our judgment on this application. We hold that this court has jurisdiction of these proceedings, and that it cannot be impeded in its action by the legislature or the courts of this state. Upon the motion herein by the relator we will grant an order for the respondents peremptorily to return the

writ, with a sworn return thereto, and that cause be shown by the refusing judges why they should not be attached for contempt in not returning the writ; such return and showing to be made within ten days.

KREKEL, J., concurs.

ORDERED ACCORDINGLY.

NOTE.—At the same term the following points were ruled in other cases:

UNITED STATES, *ex rel.* DAVIS, *v.* GREENE COUNTY COURT.

A General Warrant was Refused where Relator had Compelled the Levy of a Special Tax which was then in Process of Collection.

IN the case of *United States, ex rel. Davis*, v. *Greene County Court*, the circuit judge said, substantially: The relator asked for a *mandamus* to compel this county court to give a general warrant upon the general funds of the county. The relator had at a former term obtained, at his own instance, a *mandamus* for the levy of a special tax to pay his judgment; which tax was duly levied by the county court, and is now in process of collection. He anticipates that the levy will prove fruitless, but such result is not yet ascertained, and, without waiting therefor, he asks an additional remedy by getting a general warrant, to be paid in its order of presentation, according to the statute of Missouri. This, we hold, in the exercise of our discretion in these proceedings, we will not do, on the ground that while the people are burdened with the special tax, a general tax should not also be required to pay the warrant prayed by the relator.

KREKEL, J., concurred.

UNITED STATES, *ex rel.* CROOKE, *v.* LAFAYETTE COUNTY COURT.

Duty of County Court in Respect to the Collection of Taxes.—Return held Insufficient.

IN the case of *United States, ex rel. Crooke*, v. *Lafayette County Court*, the circuit judge substantially said: The relator, having recovered judgment, obtained, in the spring of 1877, a writ of *mandamus*, requiring the levy and collection of a tax on Lexington township. Several returns have been made by the respondents, but no money has been paid. These returns are summed up in the last, which states that the county court had levied a tax of one-tenth of one per cent on all the assessed property, but the tax had not been paid. Thereto is appended a report of the collector, who says that he made sundry levies on *personal* prop-

erty for the payment of other similar writs, but that the property had been taken from him by writs of replevin issued from the state courts, and that at tax sales no bidders appeared, and that tax-bills duly presented had been left unpaid, and that hence his efforts had been fruitless, and nothing had been paid; in short, it appears that in response to the writ issued a year and a half ago, a levy was made, tax-bills were issued to the collector, and he has done nothing whatever with them because his efforts had failed in *other* cases; because suits of replevin and a failure of bidders occurred as to other cases, he concluded it would be the same in this case. That does not satisfy the command of this court. The writ has been out a year and a half, and nothing has been done therewith. This debt of the county, being reduced to a judgment, is just as binding and valid as a debt for a court-house, and should be so treated; and if public officials were to abandon efforts to collect such debts, the community would not approve of their action. It is the duty of the county court to contest such replevin suits. Without assuming to state what should be done, it is at least clear in this case that nothing has been done herein toward collecting the tax. If the replevin suits had been appealed, and everything done that could have been done, a case would be presented different from that now before us. When judgments are given in this court, we will not doubt that they will be duly respected.

In the present case, we will grant the request of the respondents to make a further and more detailed return. And herein, or in some other case, one of us will take opportunity to write out our views at length as to the respective duties of the county justices and the collector in relation to the collection of taxes levied in obedience to a *mandamus* of this court.

KREKEL, J., concurred.

BURLINGTON AND SOUTHWESTERN RAILWAY COMPANY *v.* PUTNAM, SULLIVAN, and LINN COUNTIES.

1. Under the legislation of the state of Missouri applicable to above-mentioned railroad company (an Iowa corporation which had extended its road into Missouri in the manner set forth in the opinion), it is liable to be taxed in Missouri upon its road and property therein situate.
2. It is not exempt from taxation on the ground of consolidation with or purchase of certain Missouri railroads.

(*Before* DILLON and KREKEL, JJ.)

Taxation of Foreign Railroad Companies Extending their Roads into Missouri.—The Act of March 24th, 1870, of the State of Missouri Construed.—Consolidation.—Purchase.

THE Farmers' Loan and Trust Company filed a bill in this court against the Burlington and Southwestern Railway Company, to foreclose a mortgage which it held on its property situate in the counties of Putnam, Sullivan, and Linn, in the state of Missouri. Pending the proceedings, the defendant counties undertook to collect of the Burlington and Southwestern Railway Company taxes assessed against the same in the several counties named. Whereupon the receiver having in charge the property of said Burlington and Southwestern Railway Company filed what he termed an intervening petition, seeking thereby to restrain the defendant counties from collecting the taxes. By stipulation between the parties, this so-called intervening petition is to be treated as an original bill by the Burlington and Southwestern Railway Company against the defendant counties of Putnam, Sullivan, and Linn. The other facts appear in the opinion of KREKEL, J.

Mr. Hatfield, for the plaintiff.

Messrs. Eubanks, Barnett, Smith, and *Easley & Mullins*, for defendant counties.

KREKEL, J.—The plaintiff is a corporation organized under the laws of Iowa, and its object, as stated in the 4th article of its incorporation, is to locate, construct, maintain, and operate a railroad from the city of Burlington, Iowa, in a southwestern direction, *via* Fort Madison, in Lee county, and Farmington, in Van Buren county, to a point on the state line on the most practicable route from Moulton, in Appanoose county, Iowa, to Unionville, in Putnam county, Missouri; thence, by way of Unionville, on the most practicable route to the city of St. Joseph, in the county of Buchanan, in the state of Missouri, and to such other points in the state of Missouri or Kansas as may be determined by the board of directors.

The Burlington and Southwestern Railway Company, on the 18th day of February, 1870, consolidated with the Iowa and Missouri State Line Railroad Company (another Iowa corporation), the consolidated company retaining the name of the Burlington and Southwestern Railway Company. In the 4th article of the consolidated company, the object of the incorporation is stated to be the construction of a railroad from the city of Burlington, Iowa, in a southwestern direction, *via* Farmington, in Van Buren county, to a point on the state line at or near Pleasant Plains, in the county of Decatur, in the state of Iowa; and from thence on the most practicable route through the state of Missouri to the town of Rulo, in the state of Nebraska; thence through Nebraska and Kansas to the town of Sheridan, on the Kansas Pacific Railroad. It would seem from this that the original project to construct the road by way of Unionville, in Putnam county, to St. Joseph, Missouri, as indicated in the original act of incorporation of the Burlington and Southwestern Railway, was abandoned by the consolidated company, as, under the last project, the road is to strike the state line of Missouri in Decatur county, Iowa—a county west of Unionville, in Putnam county.

A company known as the St. Joseph and Iowa Railroad Company was incorporated in Missouri, under a charter dated January 22d, 1857. In the 3d section of this charter the object of the company is stated to be the construction of a railroad from the city of St. Joseph, in the county of Buchanan, to such point on the boundary line of the state of Iowa, and into said state, as the board may select. We have no indication in the charter as to the location of the road, except what may be inferred from the residence of the corporators who are to constitute the first board of directors. They resided in the counties of Buchanan, De Kalb, Andrew, Gentry, Daviess, Harrison, and Mercer, the last county named being on the state line. Assuming that Mercer county was to be the point at which the St. Joseph and Iowa Railroad was to strike the Iowa state line, and, as seen, the new line of the consolidated Burlington and Southwestern

Railway Company was to cross the Missouri state line in Decatur county, Iowa, we have the line of the proposed roads meeting; for Decatur county, in Iowa, and Mercer county, in Missouri, are adjoining each other on the state line between Iowa and Missouri. This may account for the change of line on the part of the consolidated Burlington and Southwestern Railway Company, and the dropping of St. Joseph as a point, for if the St. Joseph and Iowa Railroad Company build a road from St. Joseph to the Iowa state line in Mercer county, the consolidated company, building to the state line in Decatur county, would thus obtain a connection with St. Joseph.

The St. Joseph and Iowa Railroad Company secured, by one of its charter provisions, all the privileges and immunities granted to the Hannibal and St. Joseph Railroad Company. By the charter of the latter company, it had secured all the privileges granted to the Louisiana and Columbia Railroad Company. The *stock* of this last (the Louisiana and Columbia Railroad Company) was, by the 24th section of its charter, *exempted "from all state and county taxes."*

It is claimed by plaintiff, the Burlington and Southwestern Railway Company, that, by virtue of its purchase and consolidation with the St. Joseph and Iowa Railroad Company, it has obtained for its Linneus branch exemption from taxation, and that, therefore, the counties of Putnam, Sullivan, and Linn, through which the Linneus branch runs, cannot impose taxes thereon.

In order to determine this, it becomes necessary to ascertain what rights were acquired by the Burlington and Southwestern Railway Company in its purchase and consolidation of and with the St. Joseph and Iowa Railroad Company. So far as the testimony in the case shows, the St. Joseph and Iowa Railroad Company never located or commenced the construction of any road under its charter. This being the case, the question arises whether, in that condition, it could avail itself of the so-called branch act of March 21st, 1868, which provides that "Any railroad company in this state authorized by law to build branches,

and wishing to avail themselves of the provisions of this act, shall, by its board of directors, pass and cause to be entered upon its records a resolution setting forth such desire, and designating the name under which the branch shall be built, its point of intersection with its main line, and general course." It would seem that, so long as a company has not located its main line, it cannot, in the very nature of things, establish a branch; for how can it name the intersection with the main line when no main line exists? It may be that the St. Joseph and Iowa Railroad Company had in fact located its main line before it undertook to establish "the central north branch of the St. Joseph and Iowa Railroad Company," but there is no evidence in the case showing it.

If, then, the St. Joseph and Iowa Railroad Company had no legally established branch, the Burlington and Southwestern Railway Company could not acquire rights in such under its purchase and consolidation of and with the St. Joseph and Iowa Railroad Company. So far as the testimony in the case shows, the St. Joseph and Iowa Railroad Company did nothing but make the best of its charter privileges, and even of such as it might have acquired under its right to establish branch roads, had it put itself in a condition to establish branches. The exemption from taxation is claimed by plaintiff on the assumption of a legally established branch on the part of the St. Joseph and Iowa Railroad Company prior to the sale and purchase, and no such branch having been established, it cannot maintain its claim.

But assuming a branch road to have been established, can plaintiff claim exemption of taxation under the facts and circumstances shown at the trial? At the time of the supposed establishment of the central north branch of the St. Joseph and Iowa Railroad, there existed, and had existed for some time, a railroad company, organized under the general laws of the state, known as the North Missouri Central Railroad Company, engaged in the building of a railroad from Linneus, in Linn county, to Laclede, on the Hannibal and St. Joseph Railroad.

This company extended the line of its road north through the counties of Linn, Putnam, and Sullivan. It had expended upwards of $80,000, mainly in the building of the road south from Linneus, but had made and paid for surveys north from Linneus on the line of the extension. While engaged in the building of the road spoken of, the company sold and conveyed its property, rights, and franchises to the St. Joseph and Iowa Railroad Company. This company afterwards sold all its property, rights, and franchises, as before stated, to the Burlington and Southwestern Railway Company, which built and is now operating its road upon a portion of the line located and partly constructed by the North Missouri Central Railroad. It is claimed by the Burlington and Southwestern Railway Company that, by virtue of the purchase which the St. Joseph and Iowa Railroad Company made of the North Missouri Central Railroad, the North Missouri Central Railroad Company was extinguished, and that they built their road south from Unionville under and upon the location of the branch established by the St. Joseph and Iowa Railroad Company, whose rights, including the branch, they had acquired.

Let us see. We find the North Missouri Central Railroad Company engaged in building a railroad under the general law of the state, having and claiming no exemption from taxation. Another company (assuming such company to have had exemption from taxation) establishes a branch road over the same territory, and, after having done so, becomes the purchaser of the road in course of construction — can it, after completing the same, transfer its exemption to the road purchased, and thus escape taxation? It certainly cannot. The Burlington and Southwestern Railway Company, by its purchase of the St. Joseph and Iowa Railroad, including the North Missouri Central Railroad, acquired the rights and privileges of the North Missouri Central Railroad Company, of part of which it availed itself. By so doing it subjected itself to the obligations and liabilities the North Missouri Central Railroad Company was under, among them the payment of taxes. The Burlington and Southwestern Railway

Company, by locating its road over the already established line of the North Missouri Central Railroad, and availing itself of the work in the way of construction already done thereon, lost its claim to exemption, if it had such. It voluntarily mixed its own property claimed to be exempt with property undoubtedly subject to taxation. It therefore lost, or abandoned, all right to insist on exemption, even if it had such a right. If it had not purchased the North Missouri Central Railroad, and built, as claimed, its independent Linneus branch, that branch might have had a competitor in the road purchased, which the law favors rather than discourages.

So far as consolidations of railroads in Missouri are concerned, the act of March 24th, 1870, prohibits them when done for the purpose of avoiding competition, and provides that "It shall not be lawful for roads to consolidate, in whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads;" and further declares all such consolidations void, and gives parties injured by such consolidations the right to sue for damages.

The right of exemption in this case is claimed "as the successor of and owner by purchase and consolidation of the property, rights, privileges, and franchises of the St. Joseph and Iowa Railroad Company." If claimed by consolidation, there is scarcely room for doubt as to the liability of the consolidated Linneus branch for taxes. Respecting the claim for exemption on account of both purchase and consolidation made in the bill, it may be said there is nothing in the testimony from which it could be inferred that consolidation was intended, and hence no stress is laid in arriving at the result on what is said in the pleading about consolidation.

The conclusions arrived at are:

1. That the St. Joseph and Iowa Railroad Company, having failed to locate its main line, could not establish a branch, and that the Burlington and Southwestern Railway Company, by its purchase of the St. Joseph and Iowa Railroad, acquired no right dependent on the existence of a supposed branch.

2. That if a location of a main line of road had been made by the St. Joseph and Iowa Railroad Company, and said company, after the establishing of the branch road, purchased the North Missouri Central Railroad, a railroad subject to taxation, any exemption which might have been claimed for the branch road cannot be made available to avoid liability for taxation of the purchased road.

3. That the Burlington and Southwestern Railway Company acquired no greater right by the purchase of the St. Joseph and Iowa Railroad than that company had itself, and that by the location and construction of its Linneus branch over the line of the North Missouri Central Railroad it lost any right it might have had to a claim of exemption if it had constructed an entire independent branch line.

For these reasons plaintiff's bill is dismissed, and the temporary injunction dissolved.

DILLON, *Circuit Judge.*—I concur in the result reached by my brother KREKEL. I have no doubt that the Burlington company is liable to taxation upon its road and property in the state of Missouri. Without examining or questioning the grounds stated in the foregoing opinion, I place my judgment upon the provisions of section 2 of the act of the general assembly of the state of Missouri approved March 24th, 1870.

The Burlington company (an Iowa corporation) acquired its rights in Missouri under the act of the legislature of March 24th, 1870. It must take those rights *cum onere*. Those rights were acquired and are held under this act, which expressly provides that "such part of its railroad as is within this state shall be subject to taxation." The 2d section of the above-named act, so far as applicable to the question here presented, is as follows:

"Any railroad company organized in pursuance of the laws of this or any other state, or of the United States, may lease or purchase all or any part of a railroad, with all of its privileges, rights, franchises, real estate, and other property, the whole or a part of which is in this state, and constructed, owned, or leased

by any other company, if the lines of the road or roads of said companies are continuous or connected at a point either within or without this state, upon such terms as may be agreed upon between said companies respectively; or any railroad company duly incorporated and existing under the laws of an adjoining state of the United States may extend, construct, maintain, and operate its railroad into and through this state, and for that purpose shall possess and exercise all the rights, powers, and privileges conferred by the general laws of this state upon railroad corporations organized thereunder, and shall be subject to all the duties, liabilities, and provisions of the laws of this state concerning railroad corporations as fully as if incorporated in this state: *Provided*, that no such aid shall be furnished, nor any purchase, lease, sub-letting, or arrangements perfected, until a meeting of the stockholders of said company or companies of this state, party or parties to such agreement, whereby a railroad in this state may be aided, purchased, leased, sub-let, or affected by such arrangement, shall have been called by the directors thereof, at such time and place and in such manner as they shall designate, and the holders of a majority of the stock of such company, in person or by proxy, shall have assented thereto, or until the holders of a majority of the stock of such company shall have assented thereto in writing, and a certificate thereof, signed by the president and secretary of said company or companies, shall have been filed in the office of the secretary of state; *and provided, further, that if a railroad company of another state shall lease a railroad, the whole or a part of which is in this state, or make arrangements for operating the same as provided in this act, or shall extend its railroad into this state or through this state, such part of said railroad as is within this state shall be subject to taxation*, and shall be subject to all regulations and provisions of law governing railroads in this state; and a corporation in this state leasing its road to a corporation of another state shall remain liable as if it operated the road itself; and a corporation of another state being the lessee of a railroad in this state shall likewise be held liable for the

violation of any of the laws of this state, and may sue and be sued, in all cases and for the same causes, and in the same manner, as a corporation of this state might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other; and a corporation of another state being the lessee, as aforesaid, or extending its railroad, as aforesaid, into or through this state, shall establish and maintain an office or offices in this state, at some point or points on the line of the road so leased or constructed and operated, at which legal process and notice may be served as upon railroad corporations of this state."

The true construction of this act (section 2) is that, if the foreign railroad company comes into Missouri by virtue of the authority therein conferred, and either extends its own road into this state, or leases, or operates, or purchases a road in this state, it shall do so only on condition of being subject to taxation. The word "purchase," it is true, is not used in this particular clause, but it cannot be supposed, looking at the whole section and its object, that the legislature meant to say to a foreign corporation, if you lease a road which is exempt from taxation, you must pay taxes, or if you arrange to operate such a road, you must pay taxes, but if you purchase such a road, you need not pay taxes.

BILL DISMISSED.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

EASTERN DISTRICT OF ARKANSAS.

MERCHANTS' NATIONAL BANK *v.* CITY OF LITTLE ROCK.

The city of Little Rock, in payment of valid debts against the city, issued bonds in the similitude of bank-bills, in violation of statutes of the state, one of which prohibited the *making or receiving* of such paper. Afterwards the city called in and cancelled these illegal bonds, and issued in their place other bonds, which were unobjectionable in form: *Held*, that the city was liable on these latter bonds to holders thereof who had not participated in the issue of the illegal bonds, although they had notice of all the facts of the transaction.

(*Before* DILLON and CALDWELL, JJ.)

Municipal Liability on Bonds to take up Illegal Scrip Issued for Valid Debts.

THE necessary facts and the statutory enactments, as well as the nature of the action and the defence, appear in the opinion of the court, orally pronounced by the circuit judge.

Mr. McClure, for the plaintiff.

Mr. Rose, for the defendant.

DILLON, *Circuit Judge.*—This action is brought to recover on certain bonds of the city, numbered from 1 to 156, issued in 1874, under the power conferred by section 3294, Gantt's Digest. There is also a common count, based upon the same cause of action; and then another claim for an account known as the "ledger" account, which is in the nature of an acknowledgment of the liability of the city under the ordinance of October 30th, 1874.

It seems that the city, being indebted, and wanting to borrow money to pay such indebtedness and defray the necessary current expenses of the city government, in January of 1867, by the action of its council, resolved to borrow the sum of $100,000, specifying that $50,000 was for the establishment of schools, and $50,000 for other purposes.

Mr. Wassell, who was a member of the city council, testifies that at the time of the consideration of the question of the form in which the city could issue her obligations, this form of issuing the obligations of the city was deemed the most expedient—that is, to issue her obligations for money in the form of bonds. They could not, he said, issue money; they could, and did, issue bonds; and that they were advised by the city attorney that they had the power to do so.

The bonds which were issued were issued in denominations of $1, $2, $5, $10, $20, $50, and $100. The bonds were engraved with vignette, on colored paper, and in form and appearance very nearly resembling the ordinary greenback or bank-bill. The bonds in this form, purporting to be Little Rock city bonds, running for periods of from one to ten years, amounted, in the aggregate, to $100,000.

Here is the form of the bond:

"Ten years after date, the city of Little Rock will pay five dollars to bearer, with interest at the rate of eight per cent per annum at maturity.

"LITTLE ROCK, ARKANSAS, July 22d, 1867."

(Signed by the recorder and by the mayor.)

These bonds were paid out by the city for various classes of ordinary indebtedness. A portion of this money was expended under the direction of the city council—$3,500 to pay for the lot on which stands the present city hall, and $17,500 for the erection of the present city hall; $6,000 went to pay overdue coupons on bonds issued by the city, under legislative authority, in aid of the Memphis and Little Rock Railroad Company; $4,000 to put up the Peabody school-house; $6,000 was appropriated and went to pay the interest on those Memphis bonds; $3,600 to grade Markham street; $2,000 for culverts, and $5,000 and $2,000 for improvement of Ferry street; $2,000 to purchase cemetery grounds; $3,600 for the fire department; $8,000 for improving and extending the public landings; $2,000 and $4,000 for school sites; and from $1,500 to $1,700 per month was paid out on audited claims against the city for police services, salaries of city officers, gas, etc. It was paid out to persons who were creditors of the city, for property sold to it, or for materials furnished or labor performed for it.

The evidence shows—and it is undisputed—that when claims were allowed against the city by the council, a warrant was drawn on the treasurer of the city in the usual form, and when the warrant was presented to the treasurer what were called "Little Rock city bonds," on bank-note paper, were paid out by the city on those warrants—the warrant being taken up and this paper given out in exchange for it.

The city received it for taxes, in the payment of licenses and other dues, and it passed in and out of the city treasury frequently—if not generally put out again, it was reissued to some extent.

The evidence further shows—and it is an undisputed fact—that this paper, for a long period, was a very considerable portion of the circulating medium of the city; it was taken in and paid out by the merchants, bankers, and others; and the Merchants' National Bank, of Little Rock, received a very large amount of it. Undoubtedly it is true that a considerable portion of the bonds or claims sued on were for money of

this character, termed "city bonds" or "city money," which the plaintiffs had received in the course of their business as bankers. The present plaintiff was not connected originally with the issuing of this money by the city; it was not issued to advance any scheme of the plaintiff, nor for any consideration furnished by it, nor by its procurement; nor was the plaintiff in anywise connected with the inception of it.

Afterwards the city council passed an ordinance by which they invited the holders of this paper to bring it in for cancellation, agreeing to issue to them new obligations of the city for the amount of the principal of those city bonds and the accrued interest thereon. The evidence shows (it is undisputed) that under that authority the present holders surrendered to the city the sum of $31,000, including accrued interest of $354.22. They were cancelled and destroyed by the city; and in lieu of the amount of them then due, the city issued a like amount of bonds, to-wit, the bonds in this suit. The plaintiffs also had some other paper, which they surrendered in like manner, and which was cancelled by the city, which acknowledged its indebtedness for the amount by giving the plaintiff credit therefor on its ledger; and this is what is known as the "ledger account." The plaintiff shows that the new bonds were given for the principal and interest of the overdue bonds on bank-note paper, and the amount credited on the ledger account is for like bonds, and for which new bonds were not issued.

The city of Little Rock defends against this action, and its main defence is: The emission of these bonds in this form—on bank-note paper—and for the purposes in view (as it appears on their face that they were issued and circulated as money), was in direct violation of the statutes of the state in that regard, and, therefore, that the bonds thus issued were illegal and void, and that the new bonds issued in lieu thereof were also illegal, void, and without consideration, the issuing of the original bonds having been in violation of the statutory provision, and, therefore, not imposing any legal obligation against the city.

This defence makes it necessary to inquire into the legislation

on this subject in this state. I will, however, state, in this connection, that the court finds that the issuing of city bonds on bank-note paper, engraved with vignettes, in the similitude of greenbacks or bank-bills, in the denominations of $1, $2, $5, $10, $20, $50, and $100 notes, in connection with the undisputed fact that they formed for a considerable period the local circulating medium of the city and community, in lieu of currency, establishes that such bonds were issued for the purpose of circulating as money, in violation of the statutes of the state in that regard. But it is quite another question, and one not necessary to be decided in this case, whether the statutes of the state in reference thereto, and the expositions thereof by the supreme court of the state, declare that the city would not be held responsible to the holders of such bonds issued in payment of legal claims duly passed upon. I think it is better to refer to the legislation upon this subject chronologically, rather than in the order in which it is embodied in Gantt's Digest (chapter 19, p. 256). It would appear from the acts, that the state of Arkansas has for a long time had a very pronounced and decisive policy against the issue, by persons or by private or public corporations, of paper designed to pass as a circulating medium; and no one can say but that, in the light of experience, it is a wise policy.

The first act of the legislature upon the subject appears in the Revised Statutes of Arkansas of 1838 (page 674). It is entitled "private notes." No title to this act is given, but the title may be seen in another act afterwards passed, which went into effect February 14th, 1838 (sec. 5 of the act entitled "change tickets," chap. 24, p. 175, Rev. Stats.), and the title is in these words:

"SEC. 5. The act passed at this session of the general assembly, entitled 'An act to prevent the circulation of private notes in this state,' approved November 25th, 1837, shall take effect and be in force from and after the 1st day of March next."

This first act, entitled "private notes," was passed and approved November 25th, 1837, and went into effect on the 1st day of March, 1838; and it is an important consideration, in

order to understand the legislative intention, that the act entitled "change tickets" was last passed, though first to go into effect. The first act, in its 1st section, provides as follows:

"No *person* or persons, unauthorized by law, shall intentionally create or put in circulation, as a circulating medium, any note, bill, bond, check, or ticket purporting that any money or bank-notes will be paid to the receiver, holder, or bearer, or that it will be received in payment of debts, or to be used as a currency or medium of trade in lieu of money."

The next section provides:

"If any person or persons shall issue, put in circulation, sign, countersign, or endorse any such note, bill, bond, check, or ticket, he, she, or they so offending shall be indicted, and, being thereof convicted, shall be fined not less than $50 nor more that $300, and be imprisoned not exceeding twelve months."

Section 3 it is important to consider:

"If any person or company vend, pass, *receive*, or offer in payment any such note, bill, bond, check, or ticket, he, she, or they so offending shall forfeit the sum of $50, to be recovered by action of debt, with costs, to the use of any person who will sue for the same before any justice of the peace of the county in which the party offending may be found."

"SEC. 4. The preceding section shall not affect any note issued by any bank authorized by law in the United States, except notes for less sums than $5."

Approved November 25th, 1837; in force March 1st, 1838.

Now, it will be observed that corporations, private or public, are not mentioned in this act. By the 1st section, the terms of prohibition are that no person or persons, unauthorized by law, shall issue or put in circulation this unauthorized currency. By section 21 of chapter 129 of the same Revised Statutes, it is provided that "when any subject matter, party, or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included;" and by section 24 of

the same chapter it was further provided that, "for the purpose of construction, the Revised Statutes passed at the present session of the general assembly shall be deemed to have been passed on the same day, notwithstanding they may have been passed at different times. If any provisions of different statutes are repugnant to each other, that *which shall have been last passed shall prevail, and so much of any prior provision as may be inconsistent with such last provision shall be deemed repealed thereby.*"

In a case some years after, the question arose in the supreme court of the state as to whether the word *person*, as used in the act approved November 25th, 1837, included corporations and municipal corporations; and the supreme court, in the case of *Van Horn* v. *State* (5 Ark. 349), held that the word "person" did include corporations, public and private. If that is so, then we must hold this statute to read the same as though corporations had been expressly mentioned, for by construction the supreme court has incorporated the word "corporations" into the original statute; and when section 3 is read in the light of this construction, it provides not only if any person or persons, but also if any corporation or corporations, pass, receive, or offer in payment any of this illegal money, they are liable to a penalty, to be recovered by any person suing for it. And if this statute were without any modification, we have an interpretation by the supreme court of the state that corporations of all kinds, as well as private persons, are alike prohibited and liable to penalties; and not only to that effect, but the person who receives the money, or offers it in payment, is also made criminally subject to a penalty; so, while this statute provides against any person who shall put out a dangerous medium of circulation, if the law was still unmodified there would be some ground to claim, if it should be violated (and, unfortunately, all laws are violated), that the person who received and the person who attempted to offer it in payment were in *pari delicto*, for it is made criminal against him to issue it, it is equally made penal against you to receive it, and it is, therefore, equally in violation of the general

purpose of the law, and there would be no right to recover under this act as it originally stood.

But before the session of the legislature closed, they passed another act (the act approved February 14th, 1838), which, in terms, refers to the subject matter of the previous act, and modified it by discriminating in favor of the person who holds the money in plain violation of the provisions of the law. It reads: "SEC. 1. The holder or owner of any change ticket, bill, or small note, issued for the purpose of change or otherwise, shall have the right to sue the drawer, *issuer*, or endorser of such change ticket, bill or bills, or small note or notes, before any justice of the peace in this state;" allowing him to recover the money, contrary to the prohibition of the prior act. We must conclude that subsequent consideration convinced the legislature that it was better not to punish the innocent receiver. Now, there can be no doubt, upon the original statutes, that the supreme court of the state, in *Van Horn* v. *State*, was correct; nor is there any doubt that there is any less principle involved in holding municipal corporations issuing this scrip, equally with individuals, liable to the innocent party not procuring it to be issued.

There is another act in support of the view I have just stated—the act of December 17th, 1838, entitled "An act to prohibit the issuing of small bills, notes, or change tickets." The 1st section provides: "That from and after the passage of this act, it shall *not be lawful for any city*, town, or corporation whatever, within the state of Arkansas, to issue small bills or notes, commonly denominated *change tickets or shin-plasters*, unless specially authorized by law."

Section 2 provides: "That all persons, officers of such city, town, or corporation, or others, whose names shall be affixed to any such bills, notes, change tickets, or shin-plasters, issued in violation of this act, *shall be individually responsible* for the same."

This act extends the liability to all persons, officers of any corporation or town, or others, whose names shall be affixed.

Private corporations would be liable; and if any of its officers put his name to such bills or change tickets, it imposes a personal liability on him.

Section 3 provides: "That the holders of any such bill, note, change ticket, or shin-plaster, issued in violation of this act, may sue for and recover in gold or silver the amount for which they purport to be payable, from the individuals whose names shall be affixed thereto, before any justice of the peace."

This act did two things: At the time it was passed, the Van Horn case, in which the supreme court of the state held that municipal corporations were included in the first act, had not been decided, and this act removed any doubt as to whether municipal corporations, with others, were embraced within the inhibitions of the original act; and, secondly, it gave an additional remedy against the officers of the municipal corporation, making them also personally liable to the holder; but it did not take away any right or remedy given to the holder by the former act. Since the legislature chose to pass this special act relating to municipal corporations, it may be said the supreme court erred in deciding that corporations were included in the original act. But as between the legislature and the supreme court, the latter is the proper and the best interpreter of the meaning of previous acts of the legislature; and, besides, this last act had been passed and in force three or four years before the case of *Van Horn* v. *State* was decided.

Subsequently, in the case of *Jones* v. *City of Little Rock* (25 Ark. 301), the court decided that the parties seeking relief were not the proper parties to apply for it, and, in delivering the opinion of the court, it was held that there was no right to issue this paper, and in the course of the opinion it is said that if it was issued contrary to law the city would not be liable for it.

The latter statement was clearly dictum, and it is claimed that so much of the opinion in *Van Horn* v. *State* as holds the city is liable for such issues is dictum also. If this is so, one dictum neutralizes or equals the other.

I cannot say that these decisions are conclusive in settling this statute, but it is clear to my mind that, although this paper

was issued in violation of law, the legislature did not intend that the innocent holders of such paper should be held liable to the penalties imposed on those who receive it by the terms of the first act.

Upon the principles of law applicable to the subject, we are of opinion:

1. That the form and appearance of the city bonds, on bank-note paper, engraved with vignettes, in the similitude of greenbacks or bank-bills, and of the denominations of $1, $2, $5, $10, $20, $50, and $100, in connection with the undisputed fact that they did form, for a considerable period, a local circulating medium, and were used by the city and the community in lieu of currency, establishes that the said bonds were issued for the purpose of circulating as money, and in violation of the statutes of the state in that regard.

2. It is quite another question, and one not necessary to be decided in this case, and which we do not decide, whether, under the statutes last referred to, in view of the exposition thereof by the supreme court of the state, the holder of such bonds, if in nowise concerned in their illegal issue, and if they represented or were issued for a valid and legal claim against the city, could not recover thereon against the city. Nor is it necessary to determine whether the act of December 14th, 1875, has the effect to validate city money, so called, of the character of the bonds issued by the defendant city, known as city bonds, on bank-note paper.

3. The immediate consideration of the bonds in suit was the surrender by the plaintiff to the defendant of an equal amount, including interest, of what are styled "city bonds on bank-note paper," all of which last-named bonds were overdue at the time of such surrender, and of date prior to July 13th, 1868, and which were held and owned by the plaintiff at the time of such surrender, and which had been originally issued to other persons than the plaintiff, in exchange for or payment of the ordinary warrants of the city—issued to divers persons upon valid claims against the city, audited and allowed by the city council. The city bonds on bank-note paper thus held by the plaintiff were,

at the instance of the city, surrendered to it, and destroyed by it, and the bonds in suit issued therefor. Assuming, but not deciding, that if in the hands of the plaintiff the said city bonds on bank-note paper could not have been enforced in an action directly on said bonds against the city, the court is of opinion that the bonds in suit, issued by the defendant in lieu of said bonds on bank-note paper (the last-named bonds having been originally issued under the circumstances above stated, for valid debts against the city to other creditors of the city than the plaintiff, and the plaintiff not having been connected with their issue), constitute a valid ground of action against the city, and the city is liable thereon to the plaintiff, although the said city bonds on bank-note paper were of such an appearance, and of such a form, as to be especially adapted to constitute a circulating medium, and were in fact used in and about the city as a local circulating medium in lieu of money.

4. There is also a claim against the city for the amount of certain city bonds, on bank-note paper, surrendered by the plaintiff to the city at its request, for which the city issued no new bonds, but placed the amount of the bonds surrendered by the plaintiff and destroyed by the city to the credit of the plaintiff on the ledger of the city. The same principles of law apply to this claim as to the claim on the new bonds.

5. Under the foregoing views there is no question of the statute of limitation in this case, although it is probable that, under the "call" made by the city in 1875, and the action taken thereunder, this defence would in no event be available to the city; but it is not necessary to rule the point.

The plaintiffs are entitled to judgment for the amount of the new bonds issued in lieu of the bonds surrendered, and the amount placed as a credit to the plaintiff on the ledger account of the city, which was introduced in evidence.

CALDWELL, J., concurs.

JUDGMENT ACCORDINGLY.

NOTE.—This judgment was affirmed in the supreme court (98 U. S. 308). See subsequent opinion of state supreme court.

UNITED STATES, *ex rel.* MERCHANTS' NATIONAL BANK, *v.* JEFFERSON COUNTY.

1. Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds as the same become due," the power of taxation thus given enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and, under the constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the state afterward enacted.
2. In such case, it is the duty of the county court to levy and cause to be collected a tax sufficient in amount to pay the interest and principal of such bonds as the same mature, and if it does not perform this duty it may be compelled to do so by *mandamus*.

(*Before* CALDWELL, J.)

Municipal Bonds.— Enforcement of Judgment.— Levy of Taxes Compellable by Mandamus.— Obligation of Contracts.

ON the 26th day of October, 1877, the relator recovered a judgment in this court against Jefferson county for $5,120.70 and costs, on negotiable bonds issued by said county in pursuance of the provisions of the act of the general assembly of this state, entitled "An act to authorize certain counties to fund their outstanding indebtedness," approved April 29th, 1873.

By the terms of this act the boards of supervisors of the counties named therein were authorized "to issue the bonds of such counties in any sum necessary to pay the outstanding indebtedness of such counties," etc.

The bonds were to be made payable in not less than three nor more than ten years, and to bear interest at the rate of eight per cent per annum, payable semi-annually.

The 5th section of the act declares: "It shall be the duty of the board of supervisors issuing bonds under the provisions of this act, to levy a special tax of sufficient amount to pay the interest and principal of said bonds as the same become due.

Such tax shall be collected in the lawful currency of the United States, and shall not be appropriated to any other purpose than that for which it was levied. If any board of supervisors neglect or refuse to levy the tax herein provided for, the holder of any such bond shall have the right to compel such levy by a writ of *mandamus*," etc.

The constitution of the state adopted October 30th, 1874, abolished the board of supervisors, and devolved all their duties and jurisdiction on the county court, and declared they should "be regarded as a continuation of the board of supervisors." (Section 23 of schedule to constitution.)

It also provided that "No county shall levy a tax to exceed one-half of one per cent for all purposes, but may levy an additional one-half of one per cent to pay indebtedness existing at the time of the ratification of this constitution." (Article 16, section 9.)

The act under which the bonds were issued was passed, and the bonds issued, before the adoption of the present constitution. The constitution of 1868, in force at the date of the passage of this act, unlike the present constitution, contained no limitation on the power of taxation for county purposes; any rate was lawful that was authorized by act of the legislature.

Upon the relation of the judgment plaintiff, a rule issued, directed to the county judge of the county, requiring him to show cause—if any he could—at a time stated in the rule, why a peremptory *mandamus* should not issue out of this court requiring the county judge and justices of the peace of the county, composing the county court, for the levy and appropriation of taxes, to convene at the time and place fixed by law for the meeting of said court for the annual levy of the county and other taxes, and, when so convened, to proceed, in conformity to the requirements of the 5th section of the act under which the bonds were issued, to levy a special tax on all the taxable property of the county, payable only in United States currency, sufficient to pay the relator's judgment. This rule was duly served on the county

judge. No response to the rule has been filed, and the relator moves for judgment awarding the peremptory writ.

John McClure, for the relator.

CALDWELL, J.—It is a popular but erroneous opinion that the restriction on the taxing power of counties contained in the constitution of 1874 repeals or annuls the provisions of the act of 1873, making it the duty of the county court to levy a special tax sufficient to pay the interest and principal of the bonds issued under this act, as the same become due.

This erroneous view, in one instance heretofore, occasioned costs and inconvenience, and, to prevent misconception on the subject in the future, it is deemed proper to state, with some fulness, the law applicable to this class of cases.

It has long been settled by repeated decisions of the supreme court of the United States, and of many of the states, that the usual provision contained in acts authorizing counties to issue negotiable bonds, making it the duty of the proper county court, or board, to levy an annual tax sufficient to pay the principal and interest of such bonds as the same fall due, enters into and becomes a part of the obligation of the contract between the county and the holder of the bonds; and the power and duty of the proper county authorities to levy the tax required by the terms of the act authorizing the issue of the bonds cannot subsequently be withdrawn, so long as a single bond remains unpaid.

When bonds are issued under such an act, the act itself becomes a part of the contract, as much so as if it had been written out at length on the face of the bond, and it cannot be repealed or abrogated by any law of the state—neither by act of the legislature nor constitutional provision—until the obligations incurred under it are paid and discharged according to their terms.

The supreme court of the state has recently decided that the act under which these bonds were issued was legally passed under the constitution then in force; that it is a constitutional

and valid law, and that a tax levied by the county court to pay the interest on the bonds was a valid and legal tax. (*Badgett* v. *Worthen*, November term, 1877.)

The constitution of the United States declares that "No state shall pass any *ex post facto* law, or law impairing the obligation of contracts." (Constitution United States, article 1, section 10.) And it further declares that "This constitution, and the laws of the United States which shall be made in pursuance thereof, * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding;" and that "All executive and judicial officers, both of the United States and of the several states, shall be bound by oath, or affirmation, to support this constitution." (Constitution United States, article 6.)

In this state the public property of the county cannot be sold on execution to pay the debts of the county, and the only mode of discharging such debts is by the levy of a tax on the taxable property of the citizens of the county. It is obvious that the bond of a county would be valueless unless there existed a legal right to require the levy of a tax to pay it; and, as to such contracts, this right is the principal, if not the only, element of their value, and constitutes the vital part of the obligation.

This right, to the full extent to which it was granted by law for this purpose at the date of the issue of the bonds, is protected from invasion or impairment by the constitution of the United States.

In *Von Hoffman* v. *City of Quincy*, the precise question here involved was presented to the supreme court of the United States, and that court, in an opinion concurred in by every member of the court, said: "When the bonds in question were issued there were laws in force which authorized and required the collection of taxes sufficient in amount to meet the interest, as it accrued from time to time, upon the entire debt. But for the act of the 14th of February, 1863, there would be no difficulty in enforcing them. The amount permitted to be collected by

that act will be insufficient; and it is not certain that anything will be yielded applicable to that object. To the extent of the deficiency the obligation of the contract will be impaired; and if there be nothing applicable, it may be regarded as annulled. A right without a remedy is as if it were not; for every beneficial purpose, it may be said not to exist. It is well settled that a state may disable itself by contract from exercising its taxing power in particular cases. It is equally clear that where a state has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied. The state and the corporation, in such cases, are equally bound. The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute; and neither the state nor the corporation can any more impair the obligation of the contract in this way than in any other. The laws requiring taxes to the requisite amount to be collected, in force when the bonds were issued, are still in force for all the purposes of this case. The act of 1863 is, so far as it affects these bonds, a nullity. It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed. A different result would leave nothing of the contract but an abstract right—of no practical value—and render the protection of the constitution a shadow and a delusion." (*Von Hoffman* v. *City of Quincy*, 4 Wall. 535.)

And the doctrine laid down in the case last cited has been reaffirmed in numerous cases. In *Riggs* v. *Johnson County* (6 Wall. 166, 194), Mr. Justice CLIFFORD, delivering the opinion of the court, states the rule in these words: "Where a state has authorized a municipal corporation to contract and to exercise the local power of taxation to the extent necessary to meet the engagements, the power thus given cannot be withdrawn until the contract is satisfied." And this is the settled doctrine of all the courts. (*City of Galena* v. *Amy*, 5 Wall. 705, 709; *Rees* v. *City of Watertown*, 19 Wall. 107, 120; *Lansing* v. *County Treasurer*, 1 Dillon, 522; 1 Dillon on Municipal Corporations,

sec. 41, and note; Burroughs on Taxation, p. 426, sec. 139; *Hasbrouck* v. *Milwaukee*, 25 Wis. 122; *Western Savings Fund* v. *Philadelphia*, 31 Pa. St. 175; *Beckwith* v. *English*, 51 Ill. 147; *Vance* v. *City of Little Rock*, 30 Ark. 440, 441.)

It is no answer to say that the present constitution does not utterly destroy the right given by the act under which the bonds were issued—that a limited tax may still be levied. If by any subsequent act of the state the rate could be limited to five mills, it could be limited to one, or taken away altogether. "One of the tests that a contract has been impaired," says the supreme court of the United States, "is that its value has by legislation been diminished. *It is not by the constitution to be impaired at all.* This is not a question of degree or manner or cause, but of encroaching in any respect on its obligations—dispensing with any part of its force. * * * And the test, as before suggested, is not the extent of the violation of the contract, but the fact that in truth *its obligation is lessened, in however small a particular.*" (*Planters' Bank* v. *Sharp*, 6 How. 327.)

And the same court, in a recent case, held a provision of the constitution of the state of North Carolina, exempting property from sale on execution, void as to debts contracted *before* its adoption, and the court, in this case, state the rule to be that "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as to substantially impair and lessen the value of the contract is forbidden by the constitution, and is, therefore, void." (*Edwards* v. *Kearzey*, 6 Otto, 595.)

Nor does it affect the question that the law of the state impairing the obligation of a previous valid contract is made part of the constitution of the state, not even though congress has authorized and ratified such constitution. On this point the supreme court of the United States say: "Congress cannot, by authorization or ratification, give the slightest effect to a state law or constitution in conflict with the constitution of the United States. That instrument is above and beyond the power of con-

gress and the states, and is alike obligatory upon both. A state can no more impair an existing contract by a constitutional provision than by a legislative act; both are within the prohibition of the national constitution." (*Gunn* v. *Barry*, 15 Wall. 610, 623; *Jefferson Bank* v. *Skelley*, 1 Black, 436; *Dodge* v. *Woolsey*, 18 How. 331.)

The supreme court of appeals of Virginia, in a recent case, held that the provision of the constitution of that state allowing property to the value of $2,000 to be held exempt from execution for debts contracted before its adoption was in conflict with the constitution of the United States, and void as respects its application to such debts. The court said: "The fact that an enactment tending to impair contracts is embodied in the constitution of a state, does not protect it. The prohibition of the United States constitution is upon the states, irrespective of the form its laws may take or the agencies which enact them. A state has no more power to impair the obligation of a contract by a constitution than by a legislative act;" and the unanimous opinion of the court concludes in language as marked for the force with which it inculcates the moral and social duty of observing the obligation of contracts, both public and private, as for its clear enunciation of the rule of constitutional law applicable to them: "No state and no people can have any real and enduring prosperity except where public faith and private faith are guarded by laws wisely administered and faithfully executed. The inviolability of contracts, public and private, is the foundation of all social progress and the corner-stone of all the forms of civilized society where an enlightened system of jurisprudence prevails. Under our system of government it has been wisely placed under the protection of the constitution of the United States, and there it rests, secure against all invasion." (*The Homestead Cases*, 22 Gratt. 301.)

It is a remarkable fact that this state has, by her legislative enactments and constitutions, contributed largely to the exposition and elucidation of that clause of the constitution of the United States that declares, "No state shall pass any law impair-

ing the obligation of contracts." Among the earliest acts of the legislature of the state was one passed in November, 1836, incorporating the Bank of the State of Arkansas. The 28th section of the act provided "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas." The bank failed in 1839, leaving a large amount of its issues outstanding, which sunk in value until they became almost worthless. It was obvious, if the state kept her pledge, and continued to receive these worthless bills in payment of debts and taxes due her, no revenue could be collected to support the state government. In this emergency the legislature of the state, on the 10th of January, 1845, repealed the 28th section of the act incorporating the bank, which declared its bills should be received in payment of all debts due the state, and enacted that nothing but current money of the United States should be received in payment of state taxes. Public sentiment, no less than the necessities of the state, seemed to demand this action; and the supreme court of the state held the repealing act valid, and that the state was no longer bound to receive the bills of the bank in payment of debts due her. (*Woodruff* v. *Attorney General*, 8 Ark. 236.)

But the case was appealed to the supreme court of the United States, and that court reversed the judgment of the supreme court of the state, and held that the last act was in conflict with the constitution of the United States, and void, because it impaired the obligation of the contract the state had made, by the terms of the 28th section of the first act, with every one who became a holder of these bills, to receive them in payment of all debts due her; and that a tender of the bills of the bank in payment of a debt due the state after the repealing act was passed was a good and legal tender. (*Woodruff* v. *Trapnall*, 10 How. 203.)

Whether the constitution of a state, or an act of its legislature, conflicts with the constitution or laws of the United States, is a federal question, the ultimate and final decision of which, by the constitution and laws of congress, is vested in the supreme

court of the United States, whose decision is binding on all other courts, both federal and state. And the supreme court of the state, when this cause came before it again, declared "the decision of the supreme court of the United States conclusive upon the point." (*Woodruff* v. *Trapnall*, 12 Ark. 640.) And, as the result of the judgment of the supreme court of the United States, the state was compelled to, and did, redeem this worthless bank paper.

Other legislation of the state in reference to this bank furnishes another illustration of the impotency of state laws to impair the obligation of contracts. The state being the sole owner of the stock of the bank, assumed to herself, by act of her legislature, the right to administer the whole assets of the bank, without regard to the rights guaranteed to the holders of the bills of the bank under the charter. The supreme court of the state maintained the validity of this legislation. (*The State* v. *Curran*, 12 Ark. 32.)

But, on appeal to the supreme court of the United States, that court reversed the judgment of the supreme court of the state, and declared such acts of the legislature "impaired the obligation of contracts made with the lawful holders and bearers of bills of the Bank of the State of Arkansas, and so were inoperative and invalid." (*Curran* v. *State of Arkansas*, 15 How. 304.) And the supreme court of the state gave full effect to the judgment of the supreme court of the United States, and caused it to be carried into execution, its own decision and "the laws of the state to the contrary notwithstanding." (*The State* v. *Curran*, 15 Ark. 20.)

In 1851 the legislature of the state passed an act relating to the swamp lands of the state—one section of which provided that, to encourage persons to purchase the swamp and overflowed lands, the same should be "exempt from taxation for the term of ten years, or until said lands be reclaimed." Many persons purchased these lands on the faith of this promise of the state not to tax them for the period named. Public opinion changed, and in 1855 the act which exempted the swamp lands from taxation

was repealed, and such lands purchased under the act of 1851 were declared subject to taxation. The supreme court of the state held the act of 1855 was in conflict with the constitution of the United States, and void.

Mr. Justice COMPTON, who delivered the opinion of the court, said: "The constitution of the United States declares that no state shall pass any law impairing the obligation of contracts. * * * This prohibition on the law-making power is justly ranked among the wisest provisions contained in the federal constitution. Without it, private rights would at all times be liable to invasion by the enactment of laws consequent upon the *fluctuating policy, strong passions, and sudden changes;* and with it nothing more is required than the observance of an elevated morality." (*State of Arkansas* v. *County Court of Crittenden County*, 19 Ark. 360.) In this one short sentence the learned judge fully vindicates the wisdom, justice, and necessity of this provision of the constitution of the United States.

Another case afterwards arose under these same swamp land acts. The act of 1851 provided for contracts for the making of levees and drains, and for the payment of contractors in scrip, which it was declared should be received in payment for swamp lands. The 14th section of the same act, as we have seen, exempted swamp lands from taxation for the period of ten years, and this section, as before stated, was repealed by the act of 1855. In this state of the statutes, the question arose whether swamp lands purchased after the repeal of the 14th section, with levee scrip issued before the repeal, were subject to taxation — in other words, whether the repealing act did not impair the obligation of the contract of the holder of the scrip under the first act? The supreme court of the state decided that it did not have that effect, and that the lands were subject to taxation. (*McGee* v. *Mathis*, 21 Ark. 40.) This case was appealed to the supreme court of the United States, where the judgment of the supreme court of the state was reversed. Chief Justice CHASE, who delivered the unanimous opinion of the court, said: "The contract of the state was to convey the land for the scrip and to refrain

from taxation for the term specified. Every piece of scrip was a contract between the state and the original holder and his assigns. Now, what was the effect of the contract when made? Did it not bind the state to receive the scrip in payment for swamp land, exempted for a limited time from taxation? The scrip, if not receivable for lands, was worthless. To annul the quality of receivability was to annul the contract. But the exemption of the lands for which it was receivable from taxation was a principal element in its value; and repeal of the exemption was the extinction of this element of value. This was clearly an impairment of the contract. The state could no more change the terms of the contract by changing the stipulated chartacer of the land to be conveyed in satisfaction of the scrip as to liability to taxation, than it could abrogate the contract altogether by refusing to receive the scrip at all in payment for land. We are constrained to regard the repeal of the exemption act, so far as it concerns lands paid for, either before or after the repeal, by scrip issued and paid out before repeal, as impairing the contract of the state with the holders of the scrip." (*McGee* v. *Mathis*, 4 Wall. 143.)

The constitution of this state adopted and in force in 1868 declared: "All contracts for the sale or purchase of slaves are null and void, and no court of this state shall take cognizance of any suit founded on such contracts." * * (Article 15, section 14.) By this provision the framers of that constitution sought to invalidate and destroy the obligation of contracts for the sale and purchase of slaves that were valid contracts under the constitution and laws of the state in force at the time they were made. The effort proved futile. The supreme court of the state declared this section of the constitution of the state impaired the obligation of contracts, and was for that reason in violation of the constitution of the United States, and void; and such contracts were enforced according to their legal effect and obligation under the constitution and laws in force at the time they were made. (*Jacoway* v. *Denton*, 25 Ark. 625; *Sevier* v. *Haskill*, 26 Ark. 133; *Pillow* v. *Brown & Childress*, *Ib.* 240.) And the supreme court

of the United States decided the same question in the same way, and for the same reason. (*White* v. *Hart*, 13 Wall. 646.)

In no one of the cases cited, in which legislative acts and a section of the constitution of this state were declared to be in conflict with the constitution of the United States, and void, was there a plainer or more palpable violation of that instrument than there is in this case. For when it is said that "to levy a special tax of sufficient amount to pay the principal and interest of said bonds as the same become due"—as is expressly required by the terms of the act under which the bonds were issued—will require a levy in excess of the limit allowed by a constitutional provision *subsequently* adopted, the statement is a confession that this provision of the constitution, when applied to these contracts, impairs their obligation, and is, therefore, so far as it relates to them, null and void.

If a natural person gives his bond agreeing to pay a given sum of money on a day certain, it will not be pretended that the state could, by a law afterwards enacted, extend the time of payment; and if, upon the non-payment of such bond, the holder should put it in judgment, will it be contended that by such a law the state could deny to the judgment plaintiff the right to have execution for his whole debt and to levy upon and sell sufficient property to make it? By the law of this state counties are declared to be bodies "corporate and politic," and endowed with power to contract and to sue and be sued. In this case the county was by law specially authorized to issue these bonds, and to stipulate for payment of the interest and principal at fixed and stated times; and it was made its duty to levy a tax sufficient to meet these payments according to the stipulation of the bonds. Upon what principle can the state, by a subsequent enactment, relieve the county from the obligation to pay the bonds at the time and by the means agreed upon, any more than it could relieve a natural person from the obligation to pay his debt according to the terms of his contract? Confessedly, in the case of a natural person, a state law passed after the debt was contracted, declaring that not more than five mills on

the dollar of the aggregate value of the defendant's property should be taken on execution in any one year for its satisfaction, would be a nullity; and if a nullity in that case, why not a nullity in the case of a county? The protection afforded to the obligation of contracts by the constitution of the United States is not limited to the contracts of natural persons, but extends as well to all corporations—public and private—endowed by law with power to contract.

The constitutional limit is applicable, of course, to ordinary county warrants issued prior to the adoption of the constitution. These warrants having been issued for ordinary county purposes, and not under any special act, law, or contract requiring the levy of a tax to pay them, they fall within the provision of the constitution, and a five-mill tax, and no more, may be levied to pay them. And but for this provision in the constitution, it is doubtful what remedy, if any, the holders of these warrants would have had to enforce their payment. (*United States, ex rel. Sisters of Charity of St. Joseph*, v. *County Court of Ouachita County*, April term, 1876.)

If the county court of Jefferson county, or of any other county in this district to whom peremptory writs of *mandamus* may issue in this class of cases, entertains any doubt as to whether the supreme court of the United States will adhere to its many well-considered judgments, declaring the duty of this court, and of county courts as well, in this class of cases, there is a ready means of settling that doubt. The act of congress gives the county the right to appeal from the judgment of this court awarding the peremptory writ, to the supreme court of the United States; and if the required steps for that purpose are taken within sixty days after the rendition of the judgment awarding the writ, all proceedings under the writ are stayed until the determination of the cause in that court.

That is the only tribunal that can review the judgment of this court; it cannot be reviewed, nor the process upon it enjoined or otherwise obstructed or impeded, by the orders or process of any other court. (*Riggs* v. *Johnson County*, 6 Wall. 166; *Weber* v.

Lee County, *Ib.* 211; *United States* v. *Keokuk*, *Ib.* 514; *Supervisors* v. *Durant*, 9 Wall. 415; *The Mayor* v. *Lord*, *Ib.* 409; *Amy* v. *Supervisors*, 11 Wall. 136; *Ex parte Holman et al.* 28 Iowa, 88; *Vance* v. *City of Little Rock*, 30 Ark. 452, 453; *Brooks* v. *City of Memphis*, 3 Cent. Law Jour. 356; *United States* v. *Silverman*, 4 Dillon, 224.)

The power of this court to enforce its judgments, in this class of cases, according to the terms of the contract and in the mode authorized by the laws of the state, is not an open question. It would be an anomaly in the judicial system of any government to invest its courts with jurisdiction to hear causes and render judgments, and yet deny to them the power to execute and enforce their judgments. Argument upon this question in this and all other courts was long since foreclosed by the unanimous judgment of the supreme court of the United States. (*Knox County* v. *Aspinwall*, 24 How. 377.)

And the doctrine established in the case last cited—that the circuit courts of the United States have the power, and that it is their duty, to issue this writ, in this class of cases, to the proper officers of counties, cities, and towns, to compel the levy of a tax, and to enforce obedience thereto—has been reaffirmed by that court in a long line of cases, coming down to a late date. (*Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, *Ib.* 535; *City of Galena* v. *Amy*, 5 Wall. 705; *Riggs* v. *Johnson County*, 6 Wall. 166; *Weber* v. *Lee County*, *Ib.* 310; *Walkley* v. *City of Muscatine*, *Ib.* 481; *United States* v. *Keokuk*, *Ib.* 514, 518; *Benbow* v. *Iowa City*, 7 Wall. 313; *Butz* v. *City of Muscatine*, 8 Wall. 575; *The Mayor* v. *Lord*, 9 Wall. 409; *Heine* v. *Levee Commissioners*, 19 Wall. 655; *Board of Liquidation* v. *McComb*, 2 Otto, 531.)

It is apparent that some of the counties in this district, under authority of acts of the legislature, have issued bonds to fund previous indebtedness, to aid in the construction of railroads, and to build court-houses and jails, to an amount beyond their present ability to pay, without the imposition of a tax too excessive to be borne by any one community, and the imposition of which

would lead to general delinquency in the payment of taxes. It would seem to be for the interest of the creditors and counties alike, in such cases, by negotiation to reduce the volume of indebtedness within a limit the counties are able to pay, and for the counties thereafter to pay the interest without the addition of costs. Especially would this be a just measure in the case of those counties that received little or no consideration for their bonds, by reason of the improvident action on the part of their officers and the fraudulent action of the parties to whom the bonds were originally issued. But this is a matter which addresses itself to the counties and their creditors, and over which this court has no control, and which cannot be effected through its agency.

This court is powerless, in this class of cases, to relieve against the results of bad laws and the folly of the people in voting, and their officers in issuing, bonds under such laws. In answer to an appeal similar to appeals that have been made to this court in this class of cases, the supreme court of the United States said: "The counsel for the plaintiff in error has called our attention, with emphasis and eloquence, to the diminished resources of the city and the disproportionate magnitude of its debt. Much as personally we may regret such a state of things, we can give no weight to considerations of this character, when placed in the scale as a counterpoise to the contract, the law, the legal rights of the creditor, and our duty to enforce them." (*City of Galena* v. *Amy*, 5 Wall. 705.)

Popular opinion, for the time being, in particular localities, however unanimous it may be, and from whatever cause arising, cannot in a court of justice be allowed to prevail against the constitution and legal rights of the humblest suitor. Should this court yield to such influences, it would thereby only add additional costs to the already heavy burdens of these counties; for its error would meet with speedy correction in that court whose judgments in exposition of the rights of suitors under the constitution of the United States are binding on all courts, and uniform in their operation on all persons and in all places within the jurisdiction

of the United States. And this court would not long enjoy the esteem and confidence of the people of these very counties themselves if it should strike down the constitution and the law to give them a temporary relief and gain their present applause.

An order will be entered directing the peremptory writ of *mandamus* to issue in the terms of the rule. This opinion is applicable to all cases of judgments rendered on bonds issued prior to the adoption of the present constitution, under acts requiring a levy of a sufficient tax to pay them.

The clerk is directed to forward a certified copy of this opinion to the county courts of the several counties against whom peremptory writs may be awarded in similar cases.

ORDERED ACCORDINGLY.

LOWENSTEIN v. GLIDEWELL.

1. The general chancery rule is that service of subpœna to answer a cross-bill cannot be made upon the solicitor of the plaintiff in the original bill; but to this rule the United States circuit court recognizes two exceptions—one in cases of injunctions to stay proceedings at law, and the other in cross-suits in equity, where the plaintiff at law in the first and the plaintiff in equity in the second case reside beyond the jurisdiction of the court; and this only for the purpose of preventing a failure of justice.
2. The plaintiffs in the original bill in an equity suit have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs; but where a cross-bill has been filed by defendants and service of process was had thereunder on the plaintiffs, or the latter had voluntarily entered their appearance thereto, then the defendants would be entitled to a decree *pro confesso* on such cross-bill on a dismissal of the original bill by the plaintiffs after the lapse of the time allowed them by the rules to answer.
3. The bill and cross-bill in equity do not necessarily constitute one suit, and the service of a subpœna on the defendants in the cross-bill is necessary to bring them into court on such cross-bill, unless they voluntarily enter their appearance thereto, which is ordinarily done.

(*Before* CALDWELL, J.)

Subpœna to Answer Cross-Bill. — Service on Solicitor. — Bill and Cross-Bill. — Right of Voluntary Dismissal.

THE plaintiffs filed their bill to foreclose a deed of trust on real estate. R. D. Partee and wife, among others, were made defendants, upon the allegation that they had some interest in the said mortgaged premises, or some part thereof, as purchasers, judgment creditors, or otherwise, which interests, if any, have accrued subsequent and are junior to complainants' lien, and subject thereto. Partee and wife answered, alleging they were the owners in fee of the property by purchase from one Christman, from whom Parish, the grantor in the deed of trust, derived his title; that the sale of the premises by Christman to Partee and wife was made long before the conveyance by Christman to Parish, and Parish to plaintiffs; that all these parties had full notice of the purchase by Partee and wife; that a suit for specific performance of the contract for the sale of the property was brought by Partee and wife against Christman in the Pulaski chancery court, and was pending at and before the conveyance of the property by Christman to Parish, and Parish to plaintiffs, and that said parties had notice of the pendency of such suit, and that that court decreed a conveyance of the property from Christman to Partee and wife, the title under such conveyance to relate back to the 20th day of December, 1876.

Partee and wife also filed a cross-bill against the plaintiffs, setting up the same facts set out in their answer, and praying for the cancellation of the plaintiffs' deed of trust, and for a decree against plaintiffs for the rents and profits of the property received by them between the 23d of January, 1877, and the 27th of December, 1877, from the trustee in the deed of trust, who was in possession as such under said deed, and collected the rents of the property and paid the same to the plaintiffs for the period mentioned. The cross-bill was filed February 4th, 1878. No process has issued thereon, and the defendants, who are plaintiffs in the original bill, have not entered their appearance thereto.

The plaintiffs in the original bill now move for leave to dismiss the same. To this motion Partee and wife, who are named among the defendants in the original bill, and who are plaintiffs in the cross-bill, object, and they also move for a decree *pro confesso* on their cross-bill.

Plaintiffs claim the dismissal by them of the original bill operates to dismiss the cross-bill.

Erb, Summerfield & Erb, for the plaintiffs.

Dodge & Johnson, for Partee and wife.

CALDWELL, J.—The plaintiffs in the original bill have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs. (1 Barbour's Chancery Practice, 225, 228; 1 Daniell's Chancery Practice, 792.)

The cause is not at issue on the original bill—no replication to the answer having been filed—and the defendants in that bill, under rule 66, might have obtained an order, as of course, for a dismissal of the suit for this reason.

The motion of plaintiffs to dismiss their bill is granted, and the same will be dismissed at their costs.

The motion of plaintiffs in the cross-bill for a decree *pro confesso* thereon against the defendants therein named is denied.

If the defendants in the cross-bill had been served with process, or had voluntarily entered their appearance to the cross-bill, the plaintiffs therein would have been entitled to a decree *pro confesso* after the lapse of the time allowed defendants by the rules to answer.

The bill and cross-bill in equity do not necessarily constitute one suit, and, according to the established practice in equity, the service of a subpœna on the defendants in the cross-bill, although they are parties in the original bill, and in court for all the purposes of the original bill, is necessary to bring them into court on the cross-bill, unless they voluntarily enter their appearance thereto, which is the usual practice. And the general chancery rule is, that service of the subpœna in chancery to answer a cross-

bill cannot be made upon the solicitor of the plaintiff in the original bill. (1 Hoffman's Chancery Practice, 355, and note 4.)

In the chancery practice of the circuit courts of the United States there are two exceptions to this rule — (1) in case of injunctions to stay proceedings at law, and (2) in cross-suits in equity, where the plaintiff at law in the first and the plaintiff in equity in the second case reside beyond the jurisdiction of the court. In these cases, to prevent a failure of justice, the court will order service of the subpœna to be made upon the attorney of the plaintiff in the suit at law in the one case, and upon his solicitor in the suit in equity in the other. (*Eckert* v. *Bauert*, 4 Wash. 370; *Ward* v. *Sebring*, *Ib.* 472; *Dunn* v. *Clark*, 8 Pet. 1; and for application of analogous principles to parties to cross-bills, see *Schenck* v. *Peay*, 1 Woolw. 175.)

It not unfrequently occurs that the facts constituting defendant's defences to an action or judgment at law are of a character solely cognizable in equity; and in suits in equity it often happens that the defendant can only avail himself fully and successfully of his defence to the action through the medium of a cross-bill. In suits in these courts the plaintiff is usually a citizen of another state, and hence beyond the jurisdiction of the court, and in such cases defendants who desire to enjoin proceedings at law, and defendants in equity cases who desire to defend by means of a cross-bill, would, but for this rule of practice, be practically cut off from their defences by reason of their inability to make service on the plaintiff in the action. It would be in the highest degree unjust and oppressive to permit a non-resident plaintiff to invoke the jurisdiction of the court in his favor, and obtain and retain, as the fruits of that jurisdiction, a judgment or decree to which he was not in equity entitled, by remaining beyond the jurisdiction of the court whose jurisdiction on the very subject matter, and against the very party, he had himself first invoked. The reason of the rule would seem to limit it in equity cases to cross-bills either wholly or partially defensive in their character, and to deny its application to cross-bills setting up facts not alleged in the original bill,

and which new facts, though they relate, as they must, to the subject matter of the original bill, are made the basis for the affirmative relief asked. The cross-bill in this case is of this latter character, and, without deciding that this fact alone would preclude the court from directing service of the subpœna on the solicitors of the plaintiffs in the original bill, such an order will not be made after plaintiffs have filed their motion to dismiss their bill—a motion grantable as of course.

Whether the dismissal of the original bill carries with it the cross-bill depends on the character of the latter. If the cross-bill sets up matters purely defensive to the original bill and prays for no affirmative relief, the dismissal of the latter necessarily disposes of the former. But where the cross-bill sets up, as it may, additional facts not alleged in the original bill, relating to the subject matter, and prays for affirmative relief against the plaintiffs in the original bill in the case thus made, the dismissal of the original bill does not dispose of the cross-bill, but it remains for disposition in the same manner as if it had been filed as an original bill. (*Warrell* v. *Wade*, 17 Iowa, 96; 2 Daniell's Chancery Practice, 1556.)

The cross-bill in this case is of this character, and it will remain on the docket, and the plaintiffs therein can take such action in relation thereto as they may be advised, but no steps can be taken in the case until defendants are brought into court.

ORDERED ACCORDINGLY.

LEWIS v. CITY OF CLARENDON.

1. A municipal corporation cannot subscribe to the capital stock of a railroad company, and issue its bonds in payment of such subscription, unless the power so to do has been expressly conferred by law.
2. When two or more railroad companies are consolidated, the consolidated company succeeds to and possesses all the franchises, rights, privileges, and immunities of the several companies of which it was formed.

3. The right granted to a railroad company by its charter to receive municipal subscriptions to its capital stock, payable in bonds, is a right and privilege that, upon its consolidation with another company, passes to the consolidated company.
4. Where a city subscribes to the capital stock of a railroad company formed by the consolidation of two or more companies, and issues its bonds to such company in payment of the subscription, in a suit upon the bonds the city is estopped to deny the corporate existence of the company so formed, or the validity of the proceedings for the consolidation.
5. If, in the exercise of its undoubted powers, a corporation makes a contract, some stipulation of which is in excess of its powers, this does not avoid the whole contract, if, after rejecting such stipulation, there remains a good execution of the powers granted; and if a corporation having authority to issue bonds "bearing interest at the rate of six per cent," issue them bearing ten per cent, they are valid obligations for the principal and six per cent interest.
6. Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess.
7. Where authority is given "to any incorporated town or city" in a county to subscribe to the capital stock of a railroad company, such authority is not limited to towns and cities incorporated at the date of the passage of the act.

(*Before* CALDWELL, J.)

Railway Aid Bonds.— Consolidation of Companies.— Ultra Vires.

THIS action is brought to recover on overdue interest coupons cut from negotiable bonds issued by the city of Clarendon to the Arkansas Central Railway Company, in payment of a $15,000 subscription made by the city to the capital stock of said company. The following is a copy of one of the bonds:

"*State of Arkansas,*

"*No. 17.* *City of Clarendon.* *$500.*

"*$15,000 subscription to the Arkansas Central Railway.*

"Know all men by these presents, that the city of Clarendon, in the state of Arkansas, in conformity to the will of a majority of the legal voters of the said corporation, as expressed at an

election held in accordance with the laws of the said state of Arkansas, on the 25th day of July, A. D. 1871, authorizing said city to subscribe *fifteen thousand dollars* to the capital stock of the Arkansas Central Railway Company, for value received, hereby promises to pay to the Arkansas Central Railway Company, or bearer, the sum of *five hundred dollars*, lawful money of the United States of America, on the 1st day of January, A. D. 1882, at the National Park Bank, in the city of New York, with interest thereon at the rate of ten per cent per annum, payable semi-annually, on the first days of April and October in each year, at the National Park Bank, New York, on the presentation and surrender of the annexed coupons as they severally become due and payable.

"In witness whereof, the said city of Clarendon has caused this bond to be signed by the mayor and attested by the recorder, and the seal of said city to be hereunto affixed, on this 1st day of January, A. D. 1872.

"B. N. D. TANNEHILL, *Mayor.*

"PARKER C. EWEN, *Recorder.*"

By act of the general assembly of this state, approved January 20th, 1855, the Arkansas Midland Railroad Company was incorporated, and authorized to construct a railroad from Helena to Little Rock; and any "incorporated town or city in the counties of Pulaski and Monroe" was authorized to subscribe to the capital stock of said company, upon a majority vote of the legal voters of such town or city, and to issue its bonds in payment of such subscription, "bearing interest at the rate of six per cent per annum." The charter authorized the company to "make any lawful contract for uniting said road with any other road having the same terminus, or which may at any intermediate point approach the said railroad."

On the 8th day of March, 1869, there was filed in the office of the secretary of state of this state articles of association, under the general railroad incorporation law of this state, incorporating the Little Rock and Helena Railroad Company.

The purpose of this company was declared to be to construct a railroad from Little Rock to Helena.

The general act for the incorporation of railroads, approved July 28th, 1868, authorized any railroad company then or thereafter incorporated "to purchase and hold any connecting railroad and operate the same, or to consolidate their companies and make one company, under the name of one or both, or any other name." (Gantt's Digest, sec. 4969.)

On the 31st day of August, 1870, at a meeting of the board of directors of the Arkansas Midland Railroad Company, a resolution was adopted declaring "that the said company be, and the same is hereby, consolidated with the Helena and Little Rock Railroad Company, * * * and that said consolidated company be hereafter known as the Arkansas Central Railway Company."

At a meeting of the stockholders of the Arkansas Midland Railroad Company, September 21st, 1870, it was unanimously resolved, "that the action of the board of directors of the company in changing the name of the road from the Arkansas Midland Railroad Company to the Arkansas Central Railway Company be, and the same is hereby, ratified and confirmed."

At a meeting of the directors of the Little Rock and Helena Railroad Company, held on the 20th of January, 1871, it was resolved, "by the president and directors of the Little Rock and Helena Railroad Company, that we hereby agree to consolidate with said company, under the name and style of the Arkansas Central Railway Company, and do hereby authorize and empower W. H. Rogers, the president of this company, to convey unto the Arkansas Central Railway Company all the rights and privileges and immunities that we have or may have had, or by any means may hereafter become entitled to, under or by virtue of said organization, and after said conveyance is made this company shall utterly cease as a separate organization."

Mr. Taylor testifies that he was president of the Arkansas Midland Railroad Company at the time that corporation was consolidated with the Helena and Little Rock Railroad Com-

pany, and continued to be president of the consolidated company under the name of the Arkansas Central Railway Company; that the latter company built and operated about fifty miles of its road, running from Helena to Clarendon; that the business of the Arkansas Central Railway Company was conducted exclusively under the charter of the Arkansas Midland Railroad Company; that the object and purposes of the Arkansas Midland Railroad Company, and Little Rock and Helena Railroad Company, and Arkansas Central Railway Company, were identical, viz., the construction of a railroad from Helena to Little Rock, and that the proposed line of road of each of said corporations was the same.

The defences are: 1. That the defendant was not authorized or empowered to issue its bonds bearing interest at the rate of ten per cent, and that the bonds are, therefore, void. 2. Denies that there ever was such a corporation as the Little Rock and Helena Railroad Company. 3. Denies that the Arkansas Midland Railroad Company ever was legally consolidated with the Little Rock and Helena Railroad Company. 4. Denies that the Arkansas Central Railway Company was formed by the consolidation of the Arkansas Midland Railroad Company and the Little Rock and Helena Railroad Company, but alleges it was organized on the 1st day of May, 1871, as an independent corporation. 5. Denies that section 16 of the act incorporating the Arkansas Midland Railroad Company is applicable to the defendant city, which, it is alleged, "was not in existence at the date of the passage of said act, not having been founded until the year 1857, and not having been incorporated before February 8th, 1859."

E. W. Kimball, for the plaintiff.

William W. Smith, for the defendant.

CALDWELL, J.—The defendant city could not subscribe to the capital stock of a railroad company, and issue its bonds in payment of such subscription, unless it was authorized so to do

by law. Authority for the defendant to subscribe to the capital stock of the Arkansas Midland Railroad Company, and issue its bonds in payment therefor, is found in sections 16 and 15 of the charter of said company; and if the bonds in suit are void obligations, it is because they were issued under the authority of those sections.

It is a settled principle that where two or more railroad companies amalgamate or consolidate their respective roads under authority of law, the new or consolidated company succeeds to and possesses all the franchises, rights, privileges, and immunities of the several companies of which it was formed. (*Zimmer* v. *State*, 30 Ark. 677; *Robertson* v. *City of Rockford*, 21 Ill. 451; *Nugent* v. *Supervisors*, 19 Wall. 241, 242.) And that the right granted to a company by its charter to receive municipal subscriptions to its capital stock is a right and privilege that, upon its consolidation with another company, passes with its other rights and privileges to the consolidated company, has been expressly decided. (*County of Scotland* v. *Thomas*, 94 U. S. 682; reaffirmed in *County of Henry* v. *Nicolay*, 95 U. S. 619.)

If, therefore, the Arkansas Midland Railroad Company and the Little Rock and Helena Railroad Company were legally consolidated under the name of the Arkansas Central Railway Company, the latter company succeeded to all the chartered rights of the Midland company, and the defendant could rightfully subscribe to the capital stock of the consolidated company, and issue its bonds in payment therefor.

Acting under the authority of section 5 of the amended charter of the Arkansas Midland Railroad Company, and section 4969 of Gantt's Digest, proceedings were had by the last-named company and the Little Rock and Helena Railroad Company to consolidate their respective companies, under the name of the Arkansas Central Railway Company. These two roads had the same termini, and their object and purpose were identical, viz., the construction of a railroad from Helena to Little Rock.

It is objected that the consolidation of these companies under the new name was not regular and legal; that the charter of the

Arkansas Midland Railroad Company only authorized that company to consolidate with "any other road having the same terminus;" that this did not authorize consolidation with a road running parallel, and having the same termini; that the authority to consolidate given by the general act for the incorporation of railroads, passed in 1868 (section 4969 of Gantt's Digest), is limited to "connecting railroads," and does not extend to parallel roads having the same termini. It is not disputed that the consolidation took place in fact, and that the new or consolidated company, under the name of the Arkansas Central Railway Company, assumed to exercise and possess, and did exercise in fact, all the functions and franchises of a railroad corporation, under the charter of the Arkansas Midland Railroad Company; that it built and operated fifty miles of railroad, made contracts, received subscriptions to its capital stock, and exercised and performed every function pertaining to such corporation from the date of the consolidation. Its right to do so was never challenged by the state, nor questioned in any mode by any person. No director or stockholder of either of the two companies complained of the consolidation or change of name, but, on the contrary, appear to have ratified it.

If this was a suit to collect a stock subscription from a subscriber to one of the original companies, a different question might be presented. But the city of Clarendon subscribed to the capital stock of the consolidated company. The subscription was made in conformity to the authority given and the requirements contained in the charter of the Arkansas Midland Railroad Company; and the action of the city in subscribing for stock and issuing bonds must, under the evidence and pleadings, be referred to the authority given it so to do in the charter of the Arkansas Midland Railroad Company, which latter company had, by change of name or consolidation, or both, become the Arkansas Central Railway Company. By subscribing for stock and issuing its bonds, under these circumstances, to the consolidated company, the city is estopped, in a suit upon such bonds, to show that the Arkansas Central Railway Company was not a

corporation *de jure*, or that the proceedings to change the name of the Arkansas Midland Railroad Company, or to consolidate that company with the Little Rock and Helena Railroad Company, under the name of the Arkansas Central Railway Company, were not in conformity to law.

In principle, this case cannot be distinguished from the case of the *County of Leavenworth* v. *Barnes* (94 U. S. 70). In that case it was objected that the bonds were issued to a company that had no legal existence in January, 1865, when the election was held, and on the 1st of July, 1865, when the bonds were issued. Answering this objection, the supreme court say: "This company was organized in 1860, under the name of the Missouri River Railroad Company, and on the 18th of April, 1866, it consolidated with another company, increasing its capital and changing its name to that of the Leavenworth and Missouri Pacific Railroad Company. We suppose this to have been authorized by the statutes of Kansas. (Laws 1862, p. 768.) We are certainly of the opinion that when the parties interested in the two companies are content; when the newly-named company has been in operation for ten years; when the county has received and held its stock until 1869, when the same was sold by the county, by authority of the legislature, it is not competent for such a contracting party to say that there was an irregularity in the organization of the company."

In *Commissioners of Douglas County* v. *Bolles* (94 U. S. 104), the suit was upon bonds issued by the county to the St. Louis, Lawrence, and Denver Railroad Company, and the court say: "Whether the St. Louis, Lawrence, and Denver Railroad Company was lawfully a corporation capable of contracting with the defendants below, is a question that cannot be raised in this case. * * * * The company has built and operated a railroad from Lawrence to the Missouri state line, and has exercised the usual functions of a railroad corporation. It has been a corporation *de facto*, at least, if not *de jure*, from the date of its organization. Its corporate existence, therefore, and its ability to contract, cannot be called in question in a suit brought upon evidence of a debt given to it."

And in a still later case the court say: "Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it." (*Casey* v. *Galli*, 94 U. S. 680.) And the court cite in support of this doctrine: *Eaton* v. *Aspinwall*, 19 N. Y. 119, s. c. 6 Duer, 176; *Cooper* v. *Shaver*, 41 Barb. 151; *Camp* v. *Burne*, 41 Mo. 525; *Danbury and Norwalk Railroad Co.* v. *Wilson*, 22 Conn. 435; *Ellis* v. *Schmock*, 5 Bing. 521; *McFarland* v. *Triton Insurance Co.* 4 Denio, 392; *Rector* v. *Lovett*, 1 Hall, 191; *Topping* v. *Beckford*, 4 Allen, 121; *Dooley* v. *Walcott*, *Ib.* 407; *Eppes* v. *Railroad Company*, 35 Ala. 33; *Hamtramck* v. *Bank of Edwardsville*, 2 Mo. 169; *Jones* v. *Cincinnati Type Foundry*, 14 Ind. 88; *Worcester, etc. Institution* v. *Harding*, 11 Cush. 285; *Hughes* v. *Bank of Somerset*, 5 Litt. 47; *Tar River Navigation Co.* v. *Neal*, 3 Hawks, 520. And the following additional cases may be cited in support of this doctrine: Bigelow on Estoppel, 464 (2d ed. 423, 424); *Zabriskie* v. *Cleveland*, 23 How. 400; *John* v. *Farmers', etc. Bank*, 2 Blackf. 367; *Brookville, etc. Turnpike Co.* v. *McCarty*, 8 Ind. 392; *Ensey* v. *Cleveland, etc. Railroad Co.* 10 Ind. 178; *Anderson* v. *Newcastle Railroad Co.* 12 Ind. 376; *Palmer* v. *Lawrence*, 3 Sandf. 161; *Fisher* v. *Evansville and Crawfordsville Railroad Co.* 7 Ind. 407.

The charter authorizes the issue of bonds "bearing interest at the rate of six per cent per annum." There are no negative words; a higher rate is not in terms prohibited, and no penalty is prescribed for issuing or receiving bonds drawing a higher rate. At the time the bonds were issued, the constitution of

1868 was in force, which declared "no law limiting the rate of interest for which individuals may contract in this state, shall ever be passed." And the act of July 13th, 1868, was also in force, which declared it should be lawful for parties to stipulate for any rate of interest for "money loaned, or in any manner due and owing from any other person or corporation to any other person or corporation in this state." (Gantt's Digest, sec. 4278.)

The city and the railroad company seemed to have supposed this legislation had removed the restriction in the charter as to the rate of interest. Whether this is a sound view it is not necessary to determine, because the plaintiff having waived all claim for interest beyond six per cent, there are other satisfactory grounds upon which to rest the decision of the question. The power to issue the bonds is conceded; the rate of interest they should draw is a mere incident to the exercise of the power to issue, and not vital to the validity of the bonds otherwise lawfully issued. The city and the company might have agreed on a less rate than six per cent, and the insertion of a larger rate is at most a stipulation in excess of the power relating to a mere incident of the main power and contract, and the bonds are valid to the extent of the principal and lawful interest, and invalid as to the excess of interest only.

If, in the exercise of its undoubted powers, a corporation makes a contract, some stipulation of which is in excess of its powers, this does not avoid the whole contract, if, after rejecting such stipulation, there remains a good execution of the powers granted. (*Johnson* v. *County of Stark*, 24 Ill. 91, 92; *United States* v. *Bradley*, 10 Pet. 343; *Quincy* v. *Warfield*, 25 Ill. 317.) In the last case cited, under authority to issue bonds bearing eight per cent interest, bonds stipulating for twelve per cent were issued, and it was held they were valid and bore interest at the statutory rate.

If tested by the rule applicable to laws regulating the rate of interest (which, as usury laws are based on public policy, is a view too favorable to the defendant), the same result is reached. "Where a statute prescribes a rate of interest, and simply forbids

the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess." (*Farmers', etc. National Bank* v. *Dearing*, 91 U. S. 35; and see, to the same effect, *Darby* v. *Boatman's Savings Institution*, 1 Dillon, 149, and cases cited; *Burnhisel* v. *Firman*, 22 Wall. 170.) The case of *Bank of the United States* v. *Owens* (2 Pet. 557), and what is said by the court in *Tiffany* v. *Boatman's Institution* (18 Wall. 375, 384), has not been overlooked. In reference to them, it may be remarked that what is there said on the point is difficult to reconcile with what is said by the court in the later cases of *Burnhisel* v. *Firman*, *supra*, and *Farmers', etc. National Bank* v. *Dearing*, *supra*.

In the last-named cases the question was fairly raised by the record, and proper to be decided. In the last case (*Farmers', etc. National Bank* v. *Dearing*) the rule is stated with force and perspicuity, and supported by citations that show it to have been a deliberate opinion; and as this is the latest utterance of that court on the question, it must be regarded by this court as an authoritative exposition of the law, and it certainly is in harmony with the general, "though not quite uniform, doctrine of the authorities." (DILLON, J., in *Darby* v. *Boatman's Savings Institution*, *supra*.)

There seems to have been filed in the office of the secretary of state, on the 5th day of May, 1871, articles of association incorporating a railroad company to be known as the Arkansas Central Railway Company. The articles of association of that road were not filed until after the consolidation of the Little Rock and Helena Railroad Company and the Arkansas Midland Railroad Company, under the name of the Arkansas Central Railway Company. Under the provisions of section 4942 of Gantt's Digest, the articles of association of that road were a nullity, and it is not shown that it exercised, or attempted to exercise, a simple corporate function. But it is enough to say that the pleadings and proofs show that the defendant subscribed to the capital stock of the Arkansas Central Railway Company formed by the consolidation of the Little Rock and Helena Rail-

road Company and the Arkansas Midland Railroad Company, and that the bonds were issued to the company thus formed.

The authority to subscribe is given "to *any* incorporated town or city." This language embraces towns and cities then or thereafter incorporated. All that is required is that they shall be "incorporated" at the time the subscription is made. The construction of the branch to Pine Bluff was authorized by section 5 of the charter.

The plaintiff is entitled to judgment for six-tenths of the face value of the coupons, and interest on the same at six per cent from the date of the maturity of the same.

JUDGMENT ACCORDINGLY.

LEHMAN *v.* BERDIN.

1. The circuit courts of the United States give effect to the attachment laws of the state, and are bound by the construction placed upon such laws by the supreme court of the state.
2. The execution by the defendant in the attachment, in order to regain possession of the property attached, of a bond, under section 416 of the code of Arkansas, conditioned to "perform the judgment of the court," does not estop the defendant from traversing the affidavits for attachment, and defending against the attachment in every respect as if such bond had not been executed and the property had remained in the hands of the officer.
3. If the attachment is not sustained, the plaintiff, though he recover judgment for his debt, cannot resort to the bond to compel payment of such judgment.

(*Before* CALDWELL, J.)

Federal Courts.—State Attachment Laws.

THE plaintiffs brought suit against the defendant on a promissory note, and sued out an attachment on the alleged grounds that the defendant had sold, and was about to sell, his property, with the fraudulent intent to cheat his creditors. The marshal

levied the writ on certain property of the defendant, who thereupon caused a bond to be executed to the plaintiffs, conditioned as required by section 416, Gantt's Digest, which section reads as follows: "If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff by one or more sufficient sureties, to be approved by the court, to the effect that defendant shall perform the judgment of the court, the attachment shall be discharged, and restitution made of any property taken under it, or the proceeds thereof."

At this term the defendant filed an affidavit under section 457, Gantt's Digest, denying the statement of the affidavit upon which the attachment issued. The plaintiffs have filed a motion to strike from the files defendant's affidavits controverting the grounds of attachment.

Cohen & Cohen, for the plaintiffs.

Wassell & Moore, for the defendant.

CALDWELL, J.—The reasons assigned in support of the plaintiffs' motion to strike from the files the defendant's traverse of the grounds of attachment are, that the execution by the latter of the bond under section 416, Gantt's Digest, operates (1) to discharge the attachment; (2) estops the defendant from contesting the validity of the attachment on any grounds, or for any purpose; and (3) renders the obligors in the bond liable absolutely for the amount of any judgment the plaintiffs may recover in the action, without reference to the question whether the attachment was rightfully or wrongfully sued out. There are adjudged cases in some of the states that seem to support this view. (*Hazelrigg* v. *Donaldson*, 2 Metc. (Ky.) 445; *Inman* v. *Strattan*, 4 Bush, 445; *Deerolf* v. *Winterfield*, 24 Wis. 143; *Endress* v. *Ent*, 18 Kan. 236; *Payne* v. *Snell*, 3 Mo. 409; *Kennedy* v. *Morrison*, 31 Tex. 207.)

But the question is one in which the law of this state, as construed by the supreme court of the state, furnishes the rule of decision to this court. The question has not been before that

court since the adoption of the code, but it arose under prior statutes, which were the legal equivalent of section 416 of the code. Under the revised statutes of this state the defendant in an attachment suit might retain the property attached upon giving bond conditioned "that he will pay and abide the judgment of the court, or that his security will do the same for him;" and it was further provided that "when the defendant shall have filed the bond as required in the last preceding section, *the attachment shall be released, and the suit proceed as other suits at law.*" (Secs. 13 and 14, chap. 17, Gould's Digest.)

In *Delano* v. *Kennedy* (5 Ark. 457), the question was presented, whether giving the bond provided for by these sections precluded the defendant from pleading in abatement the want of a sufficient attachment bond, and the court held it did not, and that the legal effect of giving such bond was to discharge the property from the lien of the attachment and substitute the defendant's bond in its stead; that in all other respects the rights of the parties in the attachment proceeding remained the same as though no bond had been given, and the property had remained in the hands of the officer. Chief Justice RINGO dissented from the judgment of the court, and, in his dissenting opinion, states very concisely the views maintained respectively by the majority and minority of the court. He said: "The majority of this court, if I correctly understand their opinion, hold that the legal operation of this act of the defendants is to release so much of the attachment only as operates upon and binds their property, by substituting instead thereof the bonds and personal security taken by the sheriff, but that it has no effect whatever upon the attachment bond filed by the plaintiff. I hold that the legal operation thereof is to release the whole attachment, and place the parties to the action, respectively, in the same situation as if the original process had been a writ of *capias ad respondendum*, instead of an attachment, and that the proceedings in the writ thenceforward must be the same as if no such bond had been given, and no process other than a *capias* issued."

In *Childress* v. *Fowler* (9 Ark. 159), the court was asked to review the ruling in the case of *Delano* v. *Kennedy*, *supra*, and, in view of the dissent of the chief justice in that case, it did so, and, after full argument, reaffirmed the doctrine in that case, in an elaborate opinion, concurred in by all the judges, and which concludes in this language: "We therefore hold that the execution of the bond authorized by the 13th section does not impair any of the defendant's rights of defence, and that, after its execution, he may defend the action either by plea in abatement interposed in apt time and in due form, or by plea in bar, in the same manner in every respect as if he had not executed the bond and had suffered the property attached to remain in the hands of the sheriff."

After these decisions were pronounced, and by act of March 7th, 1867, the attachment law of the state was amended so as to allow the defendant to put in issue the truth of the plaintiff's affidavit to procure the attachment, thus making the law in this respect what it now is under the code; and this amendatory act further provided that the defendant might "give bond to dissolve the attachment." And section 6 declared: "That the conditions of bonds of persons dissolving attachments shall hereafter be, that he will appear and answer the plaintiff's demand at such time and place as by law he should, and that he will pay and abide the judgment of the court."

It will be observed that the language of this section, like that of the revised statutes, is better calculated to support the plaintiff's contention than is the language of section 416. And in the case of *Wood* v. *Carlton* (26 Ark. 662), the very question before the court was presented to the supreme court of the state for its determination. The defendant, whose property had been attached, had given the bond required by the act of March 7th, 1867, and the court below had thereupon declared the attachment "dissolved." Afterwards the defendant filed his plea denying the truth of the plaintiff's affidavit upon which the attachment was issued. The court say: "The plaintiff urges on the court that the giving of the bond precludes all inquiry into the

truthfulness of the affidavit. If it be admitted that the defendant, after giving bond, cannot question the truthfulness of the original affidavit, the result is that the plaintiff, by his perjury, is allowed to hold the principal and his sureties for the amount of his judgment." And after entering into a forcible argument to show that such a construction of the statute would not be in harmony with the objects and purposes of the attachment law, and would favor the unscrupulous creditor, and result prejudicially to conscientious creditors and honest debtors alike, the court, in conclusion, say that, after the execution of such bond, "the defendant may show, at any time before judgment, that the original affidavit is not true." These authorities are decisive of the question in this state.

It is argued that the Kentucky ruling on the question should be followed by the courts in Arkansas, because the code of the latter state is a copy of the code of the former, and the section under discussion identically the same in both.

If the section of the code in question was new law in this state, there would be some force in the suggestion; but, as we have seen, this provision is in legal effect precisely what the former law of the state was—is, in fact, a mere re-enactment of the old law; and if the legislature is to be credited with legislating in reference to knowledge of the decisions of the courts upon this question, the presumption must be indulged that they were more familiar with the decisions of their own courts than with those of a sister state, and that they did not, by simply re-enacting a statute of the state, intend to change its meaning, or adopt an exposition of such statute by the courts of a sister state opposed to the views of the supreme court of their own state.

Moreover, the provision is not peculiar to the Kentucky code, but was found in the codes of New York and Ohio, and probably other states, before its adoption by the former state (see sections 199 and 212, Ohio code, and 240 and 241, New York code); and the construction of the section by the New York and Ohio courts is in harmony with the decisions in this state, and opposed to the view of the Kentucky courts.

Under the New York code the attachment may be discharged upon the execution of a bond by the defendant conditioned that the sureties "will, on demand, pay to the plaintiff the amount of judgment that may be recovered against the defendant in the action." (Section 241, New York code.) A defendant whose property had been attached gave bond conditioned as required by the section last above quoted; the attachment was thereupon discharged. Afterwards the defendant filed his motion and affidavits to vacate the attachment proceedings, on the ground that sufficient facts to authorize its issue did not exist at the time it was granted, and the court entertained this motion and sustained it, and an order was made vacating the attachment proceedings. Plaintiff in the action recovered judgment for his debt, and it remaining unpaid, suit was brought on the bond given by the defendant to procure the discharge of the attachment, and the court held that the attachment having been set aside upon the ground stated, the consideration for the execution of the bond had failed, and that it could not be enforced. (*Bildersee* v. *Aden*, 10 Abb. Pr. [N. S.] 163.) And the previous rulings in that state were to the same effect. (*Cadwell* v. *Colgate*, 7 Barb. 253; *Homan* v. *Brinckerhoff*, 1 Denio, 184.)

And the same doctrine is maintained in Ohio. (*Fortman* v. *Rottier*, 8 Ohio St. 553; *Alexander* v. *Jacoby*, 23 Ohio St. 358.) In the case last cited the court say: "The interest of a party may imperatively require that his property shall be released from a wrongful attachment without delay. May he not, in such case, promptly procure the discharge of the attachment by payment of the claim on which it is founded, or by executing an undertaking according to the statute, and thus arrest the threatened ruin, without abandoning his rights to redress for the injury already done?" And the court declares the execution of such bond "cannot be regarded as an admission of record that the order of attachment was rightfully obtained."

The Louisiana code provides that the defendant may have the property released upon the execution of a bond conditioned "that he will satisfy such judgment to the value of the property

attached as may be rendered against him in the suit." And the uniform ruling in that state has been that the giving of such bond does not preclude the defendant from afterwards contesting the validity of the attachment on the ground that it was obtained on a false allegation, or upon any other sufficient ground. (*Pailhes* v. *Roux*, 14 La. 83; *Love* v. *Voorhies*, 13 La. An. 549; *Myers* v. *Perry*, 1 La. An. 372; *Brinegar* v. *Griffin*, 2 La. An. 154; *Avet* v. *Albo*, 21 La. An. 349.) When a bond is given under section 406, the property is not discharged from the lien of the attachment; the defendant may lawfully retain possession of it, but, until the attachment is disposed of, it cannot be again attached or levied upon, except subject to the prior levy, and the defendant cannot sell it divested of the lien of the attachment. (*Hagan* v. *Lucas*, 10 Pet. 400; Drake on Attachment, sec. 331.) And if the attachment is sustained, the court must, in addition to rendering judgment for the debt, condemn the property attached to be sold to satisfy the judgment (sections 455, 456, Gantt's Digest; *Gass* v. *Williams*, 46 Ind. 253); and now, under the act of November 10th, 1875, may at the same time assess the value of the property, and "render further judgment that in case said property shall not be delivered," etc., execution shall issue against the sureties, etc.

When the bond is given under section 416, the property attached is discharged absolutely from the lien of the attachment, and the bond stands as security to the plaintiff in lieu of the property; and if the plaintiff recovers judgment for his debt, this alone does not give him a right to enforce the bond; but he must also, in order to bind the obligors in the bond, have judgment sustaining the attachment (section 456), and he is then, under the act of 1875, entitled to a judgment against the defendant and his sureties in the bond for the amount recovered and costs. In such case the property attached is not condemned to be sold, because it has been released from the lien of the attachment and the bond substituted in its place; and this is all the difference in legal effect between a bond executed under section 406 and one executed under section 416. (*Bell* v. *Western, etc. Co.* 3 Metc. [Ky.] 558; *Gass* v. *Williams, supra.*)

In neither case can the plaintiff resort to the security of the bond, unless his attachment is sustained; and in neither case is the defendant estopped from showing, at the proper time and in the proper manner, that the attachment was procured, upon false allegations of fact or otherwise, in violation of law. (Sections 456, 457, Gantt's Digest; *Bildersee* v. *Aden*, *supra*; *Delano* v. *Kennedy*, *supra*; *Childress* v. *Fowler*, *supra*; *Ward* v. *Carlton*, *supra*; *Pailhes* v. *Roux*, *supra*; *Cadwell* v. *Colgate*, *supra*; *Homan* v. *Brinckerhoff*, *supra*; *Alexander* v. *Jacoby*, *supra*.)

If the defendant is estopped from contesting the attachment after giving bond under section 416, the estoppel will apply as well after the execution of the bond under section 406; for, so far as relates to the effect of the defendant's bond on his right to contest the attachment, there is no difference in the two sections.

The condition of the bond is that the defendant will "perform the judgment of the court;"—judgment of the court upon what, and for what? The answer is found in section 456: "*Upon the attachment being sustained*, the property attached or its proceeds, *or the securities taken upon the attachment*, shall be applied," etc.

The judgment, then, which the defendant's sureties must "perform" is a judgment that the plaintiff rightfully attached the defendant's property for the debt found to be due, and is, therefore, entitled to the security resulting from the attachment —in other words, a judgment sustaining the attachment—a judgment which would reach the property attached, if no bond had been given. (*Gass* v. *Williams*, 46 Ind. 253; *Inbusch* v. *Farwell*, 1 Black, 572, 573.)

Indebtedness alone is no ground for attachment; other facts must concur to render the attachment lawful, and giving this bond does not, in this state, supply the place of these other facts, nor estop the defendant from denying their existence.

The motion to strike out the defendant's affidavits traversing the attachment is overruled.

MOTION OVERRULED.

JOHN G. STEACY and CORNELIUS HURLEY *v.* THE LITTLE ROCK AND FORT SMITH RAILROAD COMPANY, ELISHA ATKINS, J. H. CONVERSE, CONWAY, POPE, JOHNSON, and CRAWFORD COUNTIES, *et als.*

1. Where, under its charter, the directors of a railroad company issued shares of stock to a contractor for building its road as full-paid shares (which contract was never questioned by shareholders or by creditors as being either fraudulent or *ultra vires*), and such shares were sold by the contractor, in the public market, as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, the holders of such shares are not subject to such equities, or liable to have the shares thus issued and thus purchased treated as unpaid shares.
2. The agreement of the company, sanctioned by the stockholders, made when the company was solvent, and acquiesced in and acted on for seven years, to release certain counties from the payment of the balance of their stock subscriptions, was, under the circumstances, held valid.
3. The charter of the Little Rock and Fort Smith Railroad Company provided that no stockholder therein should be liable for losses to any greater amount than the whole amount of stock subscribed for or taken by him, and that the charter should not be altered or amended except by the consent of the majority of the stockholders. Subsequently the constitution of the state provided for a *double* liability on the part of all stockholders in corporations; but the provisions of the constitution were never accepted by the stockholders: *Held*, that the measure of liability of the stockholders, at whatever time they became such, is that fixed by the charter, and was not increased by any subsequent act of the state not assented to by the corporation.
4. Whether the constitutional provision was self-executing, *quære?*

(*Before* DILLON and CALDWELL, JJ.)

Railway Charter. — Construction Contract. — Liability of Transferee of Shares of Stock Purporting to be Full-paid when not Full-paid in Fact. — Release of Subscriber to Stock. — Double Liability of Stockholder under Constitution of Arkansas of 1868.

THE bill of complaint of Steacy sets forth, among other matters, that Steacy, as the surviving partner of the firm of Peirce, Steacy & Yorston, on or about the 31st day of August, 1875,

instituted a suit in the state circuit court of Pulaski county, against said railroad company, for the recovery of judgment for the sums due said firm and assumed by said company; and that the said Steacy, on or about the 8th day of December, 1875, recovered judgment against said company in said suit, for the sum of $1,041,181.70, which remains and is a valid and subsisting judgment, binding against said company and the stockholders therein.

The bill of complaint of Steacy then sets forth that he, as such surviving partner of said firm of Peirce, Steacy & Yorston, on the 13th day of January, 1874, instituted another suit against said company, in which, by the consent of its attorney, he recovered judgment in said state court against said company, on the 19th day of March, 1874, for the sum of $5,510.02.

Steacy avers that he has caused execution to issue on each of said judgments, and placed the same in the hands of the sheriff of Pulaski county, who has returned *nulla bona* on the same; that said company has ceased to do business, is utterly worthless and insolvent, and has no property or effects whatever upon which to levy said executions.

That the defendants are stockholders in said company, the said Atkins owning ten thousand shares, of $25 each, of unpaid stock, and the said Converse nine hundred and sixty shares of unpaid stock; that the stock held by said defendants was issued by said corporation subsequent to the adoption of the constitution of said state, which went into effect in April, 1868; that said constitution contained the following provision, viz.: "Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such stock."

That the defendants respectively are liable to the said Steacy to the amount of stock owned by them, and each of them, in said corporation, and, in addition thereto, in an amount equal to the stock owned by each of said defendants respectively.

The prayer for relief of said original bill of complaint is that the plaintiff may "have a decree against said defendants to the extent of their double liability upon the foregoing stock, if need be, or, if a less sum will be sufficient to satisfy his demands, that they, each of them, be required to pay such proportion thereof as they are respectively liable for," and for general relief.

The bill of complaint of the said Hurley alleges, in substance, that on the 9th day of January, 1872, he recovered judgment in the said circuit court of Pulaski county, against said railroad company, for the sum of $7,981.05, which judgment is, in all respects, a valid and subsisting judgment against said company and its stockholders, and that the same has not, in whole or in part, been paid or satisfied.

That on the 19th day of April, 1876, said Hurley caused execution to issue on said judgment, and placed the same, on said day, in the hands of the sheriff of said Pulaski county, who, on the 24th day of said April, made a return thereon of *nulla bona*.

That said railroad company, regularly and in due form, executed two deeds of trust, the former December 22d, 1869, and the latter June 20th, 1870, conveying to certain trustees all its property, real and personal, and all the franchises which could be conveyed by said company, to secure its bonds, amounting, in the aggregate, to $8,500,000.

That afterwards suits were instituted in this court for the purpose of foreclosing said deeds of trust, and such proceedings were had; that all the property of said company, and all its franchises which could be sold, were sold under and by virtue of decrees rendered in said suits, on the 6th day of November, 1874, in consequence of which said decrees and sales said company became and is hopelessly insolvent.

That on January 1st, 1869, and at other times between said day and January 1st, 1872, said Atkins and Converse subscribed to the capital stock of said railroad company, viz., the said Atkins for ten thousand shares of $25 each, and the said Converse for nine hundred and sixty shares of $25 each,

by virtue of which said subscriptions the said Atkins became indebted to said company in the sum of $250,000, and the said Converse in the sum of $24,000.

That neither the said Atkins nor the said Converse ever paid to said company the whole or any part of said sums of money owing from them respectively; that the same is still due and owing to said company, and that said company is taking no steps and making no efforts to collect said sums of money.

That said sums of money due and owing from said several defendants are charged and subject in equity to the payment of the plaintiff's judgment, and that the defendants are liable to him for the amounts so due and owing by them respectively.

Complainant prays that said amounts, or so much thereof as may be necessary, be subjected to the payment of his said judgment, and that he have judgment against the said Atkins and Converse for the said respective sums of money due and owing by them to said company.

The bill of complaint of the said Hurley also sets forth allegations similar to those contained in the bill of complaint of the said Steacy, relating to the liability of the said Atkins and Converse under the aforesaid provision of the constitution of the state of Arkansas, which went into effect in April, 1868.

The prayer for relief is that the said Hurley may "have a decree for the amount due by said defendants respectively for unpaid stock as aforesaid, and also, if the same be necessary, for the amounts for which said defendants are individually liable, respectively, as aforesaid, or so much thereof as may be sufficient to pay and satisfy complainant's said judgment," and for general relief.

These defendants demurred to the bill of the said Hurley, assigning as causes for demurrer multifariousness, or a misjoinder of causes of suit; but said demurrer was overruled.

Before said suits were consolidated, each of said plaintiffs amended his bill of complaint by changing the same into a creditor's bill, and by alleging that the capital stock of said defendant corporation is $6,000,000, divided into shares of $25

each; that said stock is distributed among a very large number of stockholders, most of whom are non-residents of this state, and not within the jurisdiction of this court.

Several persons, resident in said state, are made defendants to said bills of complaint, and reasons are given why certain other persons whose names are set forth in said amended bills are not joined as defendants.

The prayer for relief in each bill is "that the aforesaid stockholders may be ordered and decreed to pay to the plaintiff the amount due him as aforesaid, as fixed and determined by the judgments aforesaid, with interest from the date of each judgment respectively, and to pay such other creditors of said corporation as may become parties to this proceeding such sums as may be found due to said creditors, and that the amount of the debts due as aforesaid to the plaintiff from said Little Rock and Fort Smith Railroad Company, and such as may be found due to such other creditors as may become parties hereto, may be adjudged against said stockholders as law and equity may require; and that the plaintiff may have such orders, decrees, and process as may be necessary to enforce the payment of such sums as may be adjudged against said stockholders, either for unpaid stock or upon their individual liability as stockholders under the constitution of 1868 of the state of Arkansas," and for general relief.

The answers of Atkins and Converse deny the validity of the plaintiffs' judgments, and insist that the railroad company was dissolved December 19th, 1874, before the large judgment of Steacy was recovered.

The answer of the defendant Atkins then proceeds to deny that he owns ten thousand shares, of $25 each, of the capital stock of said railroad company; but he admits that, as an individual, on July 30th, 1870, he owned two thousand shares of said stock; April 13th, 1871, three hundred and sixty additional shares; May 31st, 1871, two hundred and eighty additional shares; and October 12th, 1871, thirteen hundred and sixty additional shares, all of the par value of $25 each, and amounting, in the aggregate, to four thousand shares of said stock.

The defendant Converse, in said answer, denies that he owns, or ever has owned, nine hundred and sixty shares, or any other shares, of the stock of said company; but says that on the 10th of October, 1870, he purchased, with moneys furnished him by other persons, and solely as agent for said persons, among other things, sixteen hundred shares of the stock of said company; that said shares were, by accident or mistake, transferred to him on the books of said company, instead of to said other persons, but that he had no interest whatever in said shares, and simply held the title to the same as the agent or trustee of the several persons for whom he bought the same, and that, within a few days thereafter, he transferred and conveyed to said several persons the aforesaid identical sixteen hundred shares to which they were severally entitled, and that he never owned any shares of the stock of said company, except as above stated.

The answers of said defendants deny that they, or either of them, ever subscribed to the capital stock of said company, and deny that said shares of stock by them severally owned or held, as aforesaid, were unpaid stock, and that any subscriptions are due and payable upon the same, or ever have been since said defendants severally became the holders or owners of said shares of stock.

They aver that in and by section 17 of the act of incorporation of said company, among the powers specifically conferred upon the president and directors of said corporation, was the power "*to contract specially for work, labor, or materials* to be furnished to the company, and agree whether the whole or any part thereof shall be payable in the capital stock of said company;" and in and by section 29 of said act of incorporation it was enacted as follows, viz.: "The president and directors may, if they consider it expedient, receive subscriptions for stock, payable in labor or materials in and for the road, to be done and furnished under the superintendence of the directors of said company, or officers appointed by them, bond being taken to the company, with security, for the faithful performance of the work and furnishing of the materials. No director,

treasurer, engineer, clerk, servant, or other officer of the company shall be an undertaker or contractor of or for any work of said road."

That, in pursuance of the aforesaid powers conferred by sections 17 and 29, the president and directors of said company, in the year 1869, entered into a written contract with the said Warren Fisher, Jr., the said Fisher, Jr., not being then or thereafter a director, treasurer, engineer, clerk, servant, or other officer of said company, in and by which said contract the said company, among other things, agreed to issue and deliver to the said Fisher, Jr., among other things, all the capital stock of said company, with certain exceptions specified in said contract, in payment for labor done and materials furnished in and upon the construction and equipments of the railroad of said company, the same to be done or furnished under the superintendence of an officer of said company, appointed by said directors; that the said several shares of the stock of said company which said defendants severally owned or held were originally issued and delivered by the said company to the said Fisher, Jr., under and in pursuance of the stipulations and agreements contained in said contract between said Fisher, Jr., and said company, and in payment for work done and materials furnished under said contract, and in and upon the construction and equipment of said railroad; and said several shares of stock were issued as, and were, and became thereby and by reason thereof, and are, full-paid shares of stock, and not subject or liable to any calls or assessments whatsoever, either by the directors or stockholders of said company, or any creditors thereof.

As a further defence to so much and such parts of said bills of complaint as seek to hold said defendants liable to pay the whole or any part of the said alleged judgments of the said Steacy and Hurley, by reason of alleged unpaid subscriptions due upon the several shares of stock by said defendants owned or held, said defendants, in their said answers, plead the *laches* of the said Steacy and Hurley and the statute of limitations of the state of Arkansas.

The answers of said defendants deny that any liability was created or imposed upon stockholders in corporations, or upon these defendants, by the aforesaid provision of the constitution of 1868 of the state of Arkansas.

As a further defence to so much and such parts of said bills of complaint as seek to charge said defendants by reason of said constitutional provision of the state of Arkansas, defendants, in their answers, allege:

1. That, in and by section 25 of the act of incorporation of said company, all its stockholders are specially exempted from all responsibility for the debts of said company beyond the amount of their subscriptions, and that said provision of the constitution of said state is void, as impairing the obligation of contracts.

2. That the remedy supposed to have been created by said constitutional provision is barred by the statute of limitations of said state of Arkansas.

After the answers of said defendants had been filed, and after judgment had been rendered upon certain pleas in bar filed by another defendant, which set up the aforesaid special matters of defence, the said plaintiffs filed a second amended bill of complaint, in which they join other persons as defendants to said original and amended bills of complaint, and aver that they have made defendants *all* of the stockholders of said corporation who are known to said plaintiffs, and who are within the jurisdiction of this court, and solvent, and that the remaining stockholders are either insolvent or beyond the jurisdiction of this court.

The plaintiffs further allege, in said second amended bill of complaint, that these defendants, the said Atkins and Converse, "are setting up pretended payments to the Little Rock and Fort Smith Railroad Company for the stock they respectively own, and pretend that the same was paid for by Warren Fisher, Jr., in work, labor, and materials furnished to said company in the construction of the road; and said Atkins and Converse have, in their answers to the original and amended bills herein,

and the said Huntington has, in his pleas to the same, set up such pretended payments, and claim that they were made under the 29th section of said company's charter. These alleged payments are the merest pretences, and have no foundation in fact.

"Complainants allege that it is true that the said company made a contract with Warren Fisher, Jr., by which said Fisher agreed to construct said company's railroad, and equip the same, from a point on the Arkansas river opposite the city of Little Rock to Fort Smith, in the state of Arkansas, the estimated length of which was one hundred and fifty-three miles; and on that basis, as regards length, the said company agreed to pay the said Fisher, for constructing and equipping its said road, the gross amount of all the first mortgage bonds of said company; second, all the land bonds of said company; third, all the state aid bonds to which said company should be entitled under the laws of the state of Arkansas; fourth, all the stock issued, and to be issued, by said company, with certain minor exceptions stated in said contract (which said contract was in writing, and duly executed); and in order to make the above agreement more specific, said company further agreed with said Warren Fisher, Jr., that it would place a first mortgage upon said road and its appurtenances, and issue under the same six per cent gold bonds to the amount of $3,500,000, and no more, and that said company would put a mortgage upon all the lands, from whatsoever source derived, and issue seven per cent bonds thereunder to the extent of $5,000,000, and no more, and that said company would procure from the state, from the proper authorities, state aid bonds to the amount of $1,500,000. And the said company further agreed that the capital stock should be $6,000,000, of which one-half should be preferred and the other common stock.

"That in A. D. 1869 said Fisher entered upon the construction of said road, under his said contract, and performed some work and furnished some material; but before his said contract was one-third completed he abandoned the same, and said company, by an order on its books, in 1871, declared said contract

forfeited and at an end, by reason of said Fisher's failure to perform the same, since which nothing further has been done in further execution of said contract by the said Warren Fisher, Jr.

"That while said Fisher, Jr., was working on said road under his said contract, the said company paid and delivered to him all the first mortgage bonds of said company, amounting, as aforesaid, to $3,500,000, less, perhaps, about $100,000 of said bonds which were not then issued, and all the land bonds aforesaid, amounting to $5,000,000, less a small number (amount not known to complainants); also, about $800,000 of state aid bonds, issued by the state of Arkansas and delivered to said company.

"And the said Warren Fisher, Jr., the defendants, Atkins, Converse, Huntington, and other persons, who are now stockholders in said company, subscribed for all, or nearly all, the stock of said company, as aforesaid, and certificates for the same were issued to said several stockholders; the exact amount of stock so issued, and precisely how it was subscribed, the complainants are unable to state, for at that time the stock-books of the said company were kept in the city of Boston, in the state of Massachusetts, and the subscriptions for and issuance of stock were made there, under the supervision of an executive committee, and the complainants have never had access to said books, and they pray that the defendants may be compelled to produce the said original stock-book of said corporation in court.

"The complainants further aver that the bonds which the said Fisher, Jr., received, as aforesaid, were, at their fair market value at that time, greatly more than sufficient to pay for all the work done and materials furnished by the said Fisher, Jr., under said contract, or in any other manner, upon said railroad.

"And these plaintiffs are advised and believe, and so aver, that the capital stock of said company was and is a trust fund, and that the bonds so paid to the said Fisher, Jr., or sufficient of them for that purpose, at their then fair and reasonable market value, should be applied to the payment of the work done for and materials furnished by said Fisher, Jr., to said company

in the construction of its said road, whether under the contract or otherwise, and that no part of said work or materials should be applied as a payment or part payment of said stock, or as a payment or part payment of any portion thereof; and as said bonds were, at the time they were delivered to said Fisher, Jr., of value much more than sufficient to pay for said work and materials, and were a primary fund in the treasury of the said company, appropriated for that purpose, there has been no payment on said stock, or any portion of the same."

The plaintiffs then refer, for greater certainty, to the contract between said railroad company and said Fisher, Jr., a copy of which they annex to said amended bill of complaint, and pray that the same may be taken as a part thereof.

The plaintiffs then allege "that the said contract between said railroad company and said Fisher, Jr., was not made under the said section 29 of the charter of said company, nor does said section authorize the making of any such contract. They aver that in the making of said contract there was no compliance with the provisions of said section, and there was no pretence or allegation in said contract, or in the rules of the said company in relation thereto, that said contract was intended to be made under said section.

"That the aforesaid stock was not subscribed under said section 29 of said charter, nor was the same subscribed payable in work or materials, nor was any bond taken by the said company to secure the faithful performance of any work or the furnishing of any materials, but, upon the contrary, said subscription, in whatever form the same was made, was a cash subscription, and the same has never been paid, in any manner, to said company by the said Fisher, Jr., or by the said defendants, or any of them, or by any other person or persons whomsoever. The complainants have not had access to the certificates of stock issued to the last-named defendants, and do not know whether they purport to be certificates for full-paid shares of stock, or of stock which is non-assessable; but, whatever may be the form of said certificates, the complainants aver that the stock they repre-

sent has never been paid for to said company, or for its benefit; and if the said certificates have been issued as full-paid stock, or as non-assessable stock, they have been so issued in fraud of the rights of creditors of said company, and so much of the said certificates as allege that the stock is full-paid, or not assessable, is void, and the certificates have no other or greater effect than if such void allegations had never been inserted therein."

The counties of Conway, Pope, Johnson, and Crawford are among the defendants who are alleged to be stockholders whose subscriptions have not been paid.

The prayer in said second amended bill is for "process against said above-named defendants, requiring them to appear and answer the original and amended bills herein, and for the relief against them prayed for in said original and former amended bills, and for other proper relief."

The answers of said defendants, Atkins and Converse, to said second amended bill of complaint, deny that the allegations heretofore made by these defendants, that the stock which they, or either of them, owned or held in said company was issued as full-paid stock by said company, and in payment for work done and materials furnished, as alleged in their former answers, are mere pretences, and have no foundation in fact; and said defendants, in their said answers to said amended bill, reaffirm the allegations made by them in their said former answers upon this subject.

Said defendants, in their said answers, admit that the copies of the contracts annexed to said second amended bill of complaint are substantially correct copies of said contracts between said railroad company and said Fisher, Jr.; that said Fisher, Jr., began work under said contract in the latter part of the year 1869 or in the early part of the year 1870; that all work under the same was suspended in the early part of the year 1871; that said company, in the latter part of the same year, declared said contract forfeited, and that no work has been done by the said Fisher, Jr., under said contracts since said contract was declared forfeited by said company.

Said defendants, in their said answers, aver that, at the time when said work was suspended, as aforesaid, over fifty miles of said railroad had been completed by said Fisher, Jr., and accepted by said company; fifty additional miles had been graded and made ready for the iron, and a considerable amount of work had also been done upon the remaining line of said road; a large amount of iron rails had been purchased and delivered along the line of said road, to be laid thereon; a great number of ties had been cut, prepared, and delivered; a large number of locomotives, engines, cars, rolling stock, and equipments had been purchased and delivered, all under said contract between said railroad company and said Fisher, Jr., and in part compliance with the terms and conditions of said contract on his part to be performed; that a large amount of iron rails had also been purchased on account of said road and contract, but that the same were used by the aforementioned Josiah Caldwell in the construction of the Cairo and Fulton Railroad, for the building of which he at that time held the contract; and that after the contract between said Fisher, Jr., and said company had been terminated, as aforesaid, and before the aforesaid foreclosure proceedings were had, fifty additional miles of said road were fully completed by said defendants and other holders of the securities of said company.

Said defendants, in their said answers, deny that said railroad company delivered to said Fisher, Jr., as many of the first mortgage and land grant bonds of said company as is alleged in said second amended bill of complaint, but admit that said company delivered to said Fisher, Jr., bonds of the state of Arkansas to the par or nominal value of $800,000.

Said defendants deny, in their said answers, as they have denied in their former answers, that they, or either of them, ever subscribed to the capital stock of said company. They are informed and believe and aver that all the shares of stock of said company which they, or either of them, ever owned or held, were all issued in Boston, Massachusetts, to the said Fisher, Jr., by the orders and votes of the board of directors of said com-

pany, or of the executive committee of said board, residing in said state of Arkansas, under said contracts between said company and said Fisher, Jr., and upon estimates made by the chief engineer of said company, as provided in said contracts. They deny that any subscriptions to said stock were made in the said city of Boston, or elsewhere, outside of said state of Arkansas.

Said defendants, in their said answers, aver that said company was duly authorized by the 17th and 29th sections of its said act of incorporation, and by the charter of said company and the laws of the state of Arkansas, to enter into said contracts, and to issue its capital stock in the manner provided in said contract, and that all the shares of capital stock which were issued to said Fisher, Jr., under said contracts, by the board of directors of said railroad company, or by the executive committee of said board, and that all the shares of stock of said company which these defendants, or either of them, now hold or ever held, were and are full-paid shares, and not liable or subject to assessment by said company, or upon the application of any creditor of said company, whether or not a bond was taken from said Fisher, Jr., to said company, with security, for the faithful performance of said work or furnishing said materials. Whether such bond was taken or not, said defendants are ignorant.

The Little Rock and Fort Smith Railroad Company was originally incorporated in 1853, under the general laws of the state of Arkansas; but by an act of the general assembly of said state approved January 22d, 1865, entitled "An act to incorporate the Little Rock and Fort Smith Railroad Company," the corporation theretofore existing under that name continued its existence under said act.

ABSTRACT OF CHARTER.—The 1st section of said act provided "that the said corporation shall be composed of" certain persons whose names are mentioned, "and such other persons, corporations, states, counties, and cities as may subscribe to stock in said company and comply with the provisions contained in this act, and also with the by-laws, rules, and regulations of

said company, and the general law of the land respecting the same."

The 2d section fixes the termini of said road, and the 3d section contains the grant of powers, franchises, and privileges incident to corporations of that nature.

By section 4 of said act, "the capital stock of the company is fixed at $1,750,000, divided into seventy thousand shares of $25 each. A payment of five per cent on the amount of each share shall be made when the sum of $100,000 shall be subscribed. The subsequent payments shall be made in such sums and at such periods as shall be fixed by the board of directors: *Provided*, that the call shall not be made for more than ten per cent at any one time, and that sixty days notice of each call shall be given by publications in one newspaper in the city of Little Rock, one in Fort Smith, and one in Van Buren, Arkansas, and not more than three calls shall be made in any one year."

By section 5, "the state of Arkansas and the several counties upon the line of this road, or elsewhere in this state, not only may become, but are solicited to become, stockholders in said company, by subscribing for stock therein; and in the event that any or either of them do so, they shall be represented in the directory in the manner hereinafter provided."

Section 6 provides that "the said corporation shall go into operation and be organized as soon as shares of stock to the amount of $100,000 shall have been subscribed."

The sections intervening between section 6 and section 15 have no bearing upon the issues in this cause, and relate principally to matters of detail in conducting the election of directors and in the appointment of commissioners to receive subscriptions to stock, which are required to be "returned to the domicile of the company, at Clarksville, and there recorded in the office of the recorder of deeds and mortgages of the county of Johnson, and otherwise disposed of as may be required by law."

Section 15 enacts that, "in case of failure on the part of any subscriber to pay any installment on his stock when and as re-

quired, the amount due shall bear interest at the rate of ten per cent per annum from the time it falls due. The board of directors shall have the option, after thirty days written notice to the defaulter, to forfeit his stock and sell it at auction for the benefit and at the risk of said stockholder, and sue him for any deficit afterwards remaining, or to compel by suit the payment of such installment; and no stockholder shall be permitted to vote, personally or by proxy, for himself or as proxy for another, while in default."

Section 16 provides that "all meetings of stockholders shall be composed of persons or corporations, or the agents of corporations or persons, holding, in the aggregate, more than one-half of the stock of the company taken and subscribed for, in order to make valid and binding their action in the premises, except meetings called for the purpose of increasing or diminishing the capital stock of the company, at which three-fourths of the stock shall be represented. At elections more than one-half of the stock, exclusive of that taken by the state, shall be represented."

Section 17 enumerates at great length, and with much detail, the powers of the president and directors of said corporation, among which are the powers: "To do anything necessary for the construction, repair, and maintenance of the railroad hereinbefore mentioned, with as many tracks as they may deem necessary; to *contract specially for work, labor, or materials to be furnished to the company, and agree whether the whole or any part thereof shall be payable in the capital stock of the company;* to receive from the state or general government a grant of lands, or become the agent of either to dispose of lands granted, and with the same, or the aid of the same, to procure the road to be built; to make all contracts necessary thereto, and all contracts for the furnishing of iron, or other necessary equipment or supplies of the road, on such terms and credits as they think proper, including all locomotives, engines, cars, vehicles, teams, and other equipments, deemed by them necessary or useful to the purposes of the company; to borrow money for and on account of said road in any sums not to exceed $50,000, unless

authorized by a vote of two-thirds of the stockholders, exclusive of the state, to exceed that sum, and to mortgage said road and its appurtenances to secure the same; to mortgage said road, or hypothecate its receipts, to pay persons who take contracts for building the same."

In and by said section 17, said directors are required to "make a report in full detail to the stockholders, upon the 1st days of June and December in each year, of the working of the road, and its expenses and profits, as also a detailed statement of all contracts during the process of constructing the road and its bridges, with an account of the progress made;" also, "to be kept a regular set of books, in which shall be entered, in the regular order of their several dates, all business or other transactions in the company, which books shall always be open to the inspection of any stockholder, at the office of the company, during the business hours of the day;" also, "to keep a stock-book, and certificates of stock shall be issued to the stockholders, and no transfer of stock shall be binding on the company until made on its stock-books."

By section 19, "the limitation as to the amount which the board of directors may borrow, does not apply to contracts upon credit for the furnishing of iron equipments, other necessary supplies, or labor, or to *a contract for the construction of the whole road*, or a section thereof."

Section 21 provides that "no transfer of stock shall exempt the transferrer from the obligation of paying installments afterwards called for, until the whole fifty per cent on each of his shares shall have been paid."

"SEC. 24. The said company hereby reserves to itself the right either to accept or reject any act of the general assembly of this state, altering or amending this charter; which shall be decided by a vote of a majority of all the stock, exclusive of that taken by the state, at a meeting of the stockholders regularly convened for that purpose."

"SEC. 25. No stockholder in this company shall be, in any event, responsible for losses of the company to any greater

amount or extent in the whole than the amount of stock subscribed for and taken by him."

"SEC. 29. The president and directors may, if they consider it expedient, *receive subscriptions for stock, payable in labor or materials in and for the road*, to be done and furnished under the superintendence of the directors of said company, or officers appointed by them, bond being taken to the company, with security, for the faithful performance of the work or furnishing of the materials. No director, treasurer, engineer, clerk, servant, or other officer of the company, shall be an undertaker or contractor of or for any work on said road."

"SEC. 31. This charter shall continue for the term of ninety-nine years; at the end whereof, the corporate privileges hereby granted shall cease and terminate."

ABSTRACT OF VOTES, ALSO OF THE HISTORY OF THE CORPORATION.—The counties of Conway, Pope, Johnson, and Crawford severally subscribed to the stock of said corporation to the aggregate amount of $52,000, and the state of Arkansas, under an act approved January 15th, 1861, invested the proceeds of the sales of certain swamp lands, amounting to $38,000, in the stock of the company, and full-paid certificates of stock for said amount were issued to said state.

Prior to January 1st, 1868, the directors had made the following calls upon the stockholders on account of their subscriptions, viz.: November 9th, 1853, five per cent; June 8th, 1854, one and one-half per cent; December 23d, 1859, five per cent; May 13th, 1860, five per cent.

On the 2d of September, 1869, an additional call of ten per cent was made, payable on or before December 15th, 1869.

At a meeting of the stockholders held on the 2d day of December, 1869, it was voted that no further calls should be made upon the original stock subscriptions, but that certificates of stock should be issued to all those who had paid up the calls already made, and that the balance of their subscriptions should be cancelled. The directors were requested to carry this vote into effect.

On January 25th, 1870, the directors instructed the secretary to cancel seventy-three per cent of the original individual and county subscriptions, "and to issue, under the direction of the president, certificates of stock to all stockholders whose accounts shall, on the 15th day of March next, show credits to the amount of twenty-seven (27) per centum of the stock now standing in their names."

The directors also voted, at the same meeting, "that all stock which shall not, on the 15th day of March next, be credited with payments amounting to twenty-seven (27) per centum in the aggregate, shall be forfeited to the company, and shall be sold so far as paid to the highest bidder, for the benefit of the delinquent, as provided by the charter; and the secretary of the company is hereby directed to give legal notice of the same, and to carry into execution this resolution."

And in December, 1870, the directors voted that it was "inexpedient for the company to attempt the further collection of calls upon the original individual and county subscriptions, and that the secretary cancel on the stock-books of the company such per centum of the subscriptions as now remain unpaid, and issue certificates of stock to each stockholder for the amount respectively paid—that is, one share of stock for each sum of $25 paid, the stockholder to lose the fraction or excess paid over a full share."

The treasurer of said company delivered to said Fisher, Jr., or on his account under said contracts, and by order of the board of directors of said company, seventy-four thousand shares of common stock and seventy-four thousand shares of preferred stock, all of the par value of $25 per share. These shares were delivered as follows, viz.:

July	28th, 1870,	60,000	shares	common stock.
July	25th, 1870,	60,000	shares	preferred stock.
September	28th, 1870,	6,000	shares	common stock.
September	28th, 1870,	6,000	shares	preferred stock.
December	5th, 1870,	6,000	shares	common stock.
December	5th, 1870,	6,000	shares	preferred stock.
February	3d, 1871,	2,000	shares	common stock.
February	3d, 1871,	2,000	shares	preferred stock.

The votes of the directors of said company authorizing the issue and delivery of the above shares of stock were passed at various times, as follows, viz.:

September 2d, 1869, a meeting of the board of directors was held, at which were present Messrs. A. J. Ward, D. E. Jones, C. C. Reid, Jr., E. Wheeler, D. H. Barnes, U. M. Rose, and James A. Martin.

"On motion of Mr. Martin, the following resolution was adopted, without dissent, to-wit:

"*Resolved*, That the secretary of this company be directed to issue to Warren Fisher, Jr., the assignee of DeWitt C. Wheeler, trustee, common stock of this company to the amount of thirty-five thousand dollars ($35,000), at par, on account of work done and materials furnished under the contract for the construction of the road of this company, previous to the 1st day of September, 1869."

February 8th, 1870, at a meeting of the board of directors, at which were present Messrs. C. G. Scott, U. M. Rose, James A. Martin, J. H. Haney, and E. Wheeler—a quorum—Mr. Rose offered the following resolution, which was unanimously adopted, viz.:

"*Resolved*, That the consulting engineer of this company proceed, with the assistance of the chief engineer of the contractors, to make a detailed estimate of all work done and materials furnished by the said contractors in the construction and equipment of the said road, and report the same at the next meeting of the board, or as soon thereafter as possible."

July 11th, 1870, a meeting of the directors was held, at which five directors were present—a legal quorum. (The record does not give their names.)

"Mr. J. H. Haney, consulting engineer, presented and filed his report and estimate of the amounts due to the contractors by the terms of the contract, and thereupon Mr. Rose offered the following resolutions, which were unanimously adopted, to-wit:

"*Resolved*, That the president, in his discretion, be, and he is hereby, authorized to deliver to Warren Fisher, Jr., the sum of

$787,500 in the first mortgage bonds of the company, and the sum of $1,125,000 in the land bonds of the company, and the sum of $675,000 in preferred stock of the company, and the sum of $675,000 in the common stock of the company; such being the estimate of J. H. Haney, Esq., consulting engineer of the company, of the *amount now due him on his contract.*

"*Resolved*, That the president may, in his discretion, advance to said Warren Fisher, Jr., any greater amount of bonds or stock, upon his giving good and sufficient security as provided in said contract: *Provided*, that the said Warren Fisher, Jr., shall also include in said security the excess of first mortgage bonds already delivered to him by way of advances to him: *Provided*, further, that said Warren Fisher, Jr., shall first execute his power of attorney to the secretary of this company for the transfer of stock, as required by said contract.

"*Resolved*, That the president be, and he is hereby, authorized to take the seal of the company with him to Boston, Massachusetts, and there to execute, sign, and deliver said bonds and stock in accordance with the terms of these resolutions."

November 15th, 1870, a meeting of the directors was held, at which were present John C. Pratt, president, and Messrs. Scott, Rose, Wheeler, Lawson, and Martin. The following resolution was unanimously adopted, viz.:

"*Resolved*, That the executive committee shall have full power to deliver to Warren Fisher, Jr., the contractor, or his assigns, the stock and bonds of this road in such amounts and at such times as they may deem expedient."

At various times between February 15th, 1870, and June 9th, 1871, the treasurer of said company also issued and delivered to the said Fisher, Jr., or on his account, by order of the board of directors, $3,340,000 first mortgage bonds, $4,441,000 land bonds, and $900,000 state aid bonds; of which $550,000 first mortgage bonds, and $950,000 land bonds, were issued as loans subsequently to December 22d, 1870. Of the bonds loaned, as aforesaid, only $55,000 first mortgage bonds, and $55,000 land bonds, were returned to said company.

The plaintiffs seek to hold the defendants, Atkins and Converse, liable to contribute to the satisfaction of their several judgments against the Little Rock and Fort Smith Railroad Company, upon two distinct and independent grounds, viz.:

First. Because these defendants are the owners of certain unpaid shares of stock of said company.

Second. Because, under the constitution of 1868 of the state of Arkansas, stockholders in corporations are not only liable for such amounts as remain unpaid upon the shares of stock by them owned, but "to a further sum equal in amount to such stock."

The counties of Conway, Pope, Johnson, and Crawford, prior to 1869, had severally subscribed to the stock of the railroad company, paid twenty-seven per cent thereof, and rely upon the action of the stockholders of December 2d, 1869, and of the directors January 25th, 1870, heretofore mentioned, releasing them from further liability, and upon the statute of limitations of the state and the *laches* of the complainants. The other necessary facts are stated in the opinion.

W. H. Winfield, B. F. Rice, M. L. Rice, and *Mr. Thoroughman,* for the plaintiffs.

C. W. Huntington, for Atkins and Converse.

U. M. Rose, for certain other defendants.

DILLON, *Circuit Judge.*—It is not necessary to decide whether the company's contract with Warren Fisher, Jr., for the construction of the road, would have been held valid if it had been assailed by non-concurring shareholders or by the creditors of the company. A contract for the construction of the *whole* road seems, however, to have been contemplated as permissible by the 19th section of the company's charter; and the 17th and 29th sections contained express authority to receive subscriptions for stock, "payable in labor or materials in and for the road;" * * "bond being taken to the company, with security, for the faithful

performance of the work or furnishing of the materials." But it is not necessary to pass upon the validity of the Fisher contract, for the reason that the complainants' bills do not attack it either as being fraudulent or *ultra vires*. Nor has it been assailed in argument on either of these grounds, or on any ground, by the learned counsel for the complainants. In these causes the validity of that contract, so far as it authorized the issue of stock in payment for work done by Fisher, must, therefore, be assumed. Stock was thus issued, purporting to be full-paid stock.

On September 2d, 1869, the directors of the company ordered the secretary to issue $35,000 in the common stock of the company, at par, "on account of work done and materials furnished under the contract for the construction of the road, previous to September 1st, 1869."

On February 8th, 1870, the engineers of the company were instructed, by the unanimous vote of the directors, to make a detailed estimate of all work done and materials furnished by Fisher, and report; and in July, 1870, the report having been made, the directors unanimously authorized the delivery to Fisher of $787,500 first mortgage bonds, $1,125,000 land grant bonds, $675,000 in the preferred stock, and $675,000 in the common stock of the company; "such being the estimate of the consulting engineer of the company of the *amount now due him on his contract*." It was also resolved, at the same meeting, "that the president might, in his discretion, *advance* to Fisher any greater amount of bonds or stock, upon his giving good and sufficient security under his contract."

On November 15th, 1870, the directors authorized the executive committee to issue to Fisher "stock and bonds of this road in such amounts and at such times as they may deem expedient." Some stock was advanced, under authority thus conferred, without security being required; but this latter fact does not appear on the records of the company. The stock earned under the contract, and that issued in advance of being earned, was in the same form, and alike purported to be paid-up stock.

The defendants, Atkins and Converse, never made an original

subscription to the stock of the company, and they became holders of its shares by the purchase of the same in Boston, through brokers in the market, without any actual knowledge of the facts connected with its issue. The shares thus purchased by the defendants, Atkins and Converse, were shares which had been issued to Fisher by the company, under the resolutions and circumstances hereinbefore set forth; but whether these shares were shares which had been fully earned by Fisher, or shares which had been advanced to him in anticipation of work to be done, does not appear, nor is it possible, as counsel concede, ever to ascertain.

The ground of liability on the part of the defendants, Atkins and Converse, is that, in point of fact, none of the shares issued to Fisher were ever paid for; that he had received in *bonds* more in value than the work he performed under his contract was worth; that, not having complied with his contract, his agreement, contained in his construction contract with the company, to take the shares, must now be regarded and treated as an agreement to pay for the shares in cash; and that shares, not being *negotiable* in the sense of the law merchant, are open, in the hands of every holder, to all the equities which attach to them in the hands of the original taker; and, therefore, since Fisher, if he held the shares, could be compelled to pay for them by the company, or, at all events, by its creditors, the present holders of such shares, although they are holders for value, and without actual notice of the equities in respect thereto as between Fisher and the company, are necessarily charged with the obligations which attach to the original subscriber or holder of the shares.

There is no allegation in the bills of complaint that the defendants, Atkins and Converse, were in any way interested in, or parties to, the contracts under which said shares of stock were issued, or that they had any knowledge of such contracts when they purchased their shares of stock. Neither is there any allegation in the bills of complaint that said defendants were parties or privies to any over-issue or over-payment of bonds or stock by said company to Fisher, Jr., or that the defendants had

any knowledge or information that such alleged over-issues or over-payments had been made. Neither is there any allegation that the defendants had any knowledge or information that the shares of stock owned by them had not been paid for in full, or that they had any knowledge or information that their certificates of stock were issued in fraud of the rights of creditors.

Upon the allegations of the plaintiffs' bills, as well as upon the proofs, these defendants are to be treated as the *bona fide* purchasers and holders of the shares of stock by them severally owned.

The plaintiffs nowhere allege, indeed, that any shares of stock were issued to said Fisher, Jr., by said corporation, otherwise than in accordance with the terms of said contract, or that any shares were issued in excess of the stipulations of said contract.

It is our judgment, especially in view of the provisions of sections 17, 19, and 29 of the company's charter, before adverted to, that shares of stock issued as full-paid shares by authority of the board of directors, under the construction contract, which was never questioned by the company or its shareholders or creditors, and which is not assailed or impeached by the pleadings in the cause, and sold by the contractor as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, if any there be, cannot be held subject to such equities, and to a liability to have shares thus issued and thus purchased treated as unpaid stock. No case holding such a doctrine was referred to by the learned counsel for the complainants, and it is confidently believed that no such judgment has ever been pronounced. It is difficult to perceive any principle of reason or law on which such a judgment could rest. The company have the power to issue its shares. It cannot, without special authority from the legislature, issue its shares as full-paid without actual payment in money, or, at least, in money's worth. A leading object of the creation of corporations and the issue of shares is that the shares may be transferred with all practicable facility. (*Bank* v. *Lanier*, 11 Wall. 369; *New York, etc. Railroad Co.* v. *Schuyler*, 34 N. Y. 30, 82.)

The company's directors and officers are the guardians of the company's rights. They ought not to issue shares in violation of their duty. They know whether the shares have been paid for or not. This the public have no means of knowing, and no effectual means for ascertaining. If the company's directors, or other authorized officers, commit a fraud upon the company in this respect, they are undoubtedly liable therefor. But can any one point out wherein the equities of the creditor of a company thus defrauded by its officers is superior to the equities of those who have acted upon the representations of such officers within the scope of their powers, accredited by resolutions of the directors and authenticated by the corporate seal, and upon such solemn assurances purchased the shares of the company? Grant that the capital stock is a trust fund for the benefit of creditors, yet this trust cannot be followed, any more than other trusts, into the hands of *bona fide* purchasers for value. (Per SWAYNE, J., in *Sanger* v. *Upton*, 91 U. S. 56, 60.)

What contract did the defendants Atkins and Converse make? They made a contract to buy, and did buy, what the company had issued and represented to be full-paid shares, without notice that this representation was untrue. If the representation thus made is true, they are under no liability again to pay for the shares. If the shares had been represented to have been unpaid, *non constat* that they would have purchased them. Clearly the *company* would be estopped to make the claim here advanced by its creditors.

Again, we ask, in what consists the superior equity of the creditor over the obvious equities which exist in favor of such a purchaser of the company's shares? The creditor trusted that the company's officers would not violate their duty; the purchaser trusted that they had not violated their duty.

The rights and obligations of a *bona fide* transferee of shares purporting to be full-paid shares are different from the rights and obligations of the transferee of shares which do not purport to be full-paid. In cases where the certificates show on their face that the shares have been paid in part only, the law

implies a promise by the transferee to pay the balance due upon the shares upon calls when he has come into privity with the company. (*Webster* v. *Upton*, 91 U. S. 65, 69; *Upton* v. *Trebilcock*, *Ib.* 45.) Such an implied promise rests upon the reasonable and obvious ground that the transferee has knowingly and voluntarily assumed the liability of the transferrer. But upon what ground can the law raise a promise to pay the balance due upon shares when the company has asserted, and the purchaser acts upon the assurance, that the shares have been fully paid?

The question here urged by the complainants is settled by the universal practice of business men, as well as by the judgments of the courts. Millions of dollars of stocks are sold in this country every week, and there is no practice on the part of purchasers and no understanding that the law requires of them that they shall ascertain *aliunde* the representations of the company's authorized officers that certificates of full-paid stock have in fact been fully paid. How could a purchaser ascertain this fact? Must he go to the records of the particular corporation, in a remote and distant state it may be, and make an examination before he can safely buy? What more value is to be placed upon facts stated in the records than upon those stated under the corporate seal, by the authorized officers, as respects matters *infra vires?* Officers who would state a falsehood on the certificate of stock would state it on the corporate records, if this were necessary to make the intended fraud effectual. And, hence, the duty so much insisted on in argument, that a purchaser is bound to know the facts appearing on the corporate records, in addition to its being an impracticable duty, would, if discharged, be valueless as a guaranty against frauds upon creditors. Besides, on what principle is it that a purchaser of the company's shares is to be held to be the guardian of the rights of the company's creditors and bound to protect them? But the exigencies of this case do not require us to go so far, since, if we concede that a *bona fide* transferee for value of full-paid shares is charged with knowledge of all the facts concerning those shares appearing on the records of the corporation, there is nothing therein disclosed

which shows that the shares purchased by Atkins and Converse had not been paid for by Fisher under his contract. The company's records show that a large amount of stock had been earned by Fisher and ordered to be issued, and under the 29th section of the charter other stock was ordered to be advanced to him, on his giving bond to the company to pay for the same under his construction contract, the validity of which was not questioned by the company or any of its shareholders.

But the question here presented does not rest alone upon general reasoning. The subject was somewhat considered by the circuit court for the eastern district of Missouri, in *Phelan* v. *Hazard* (Cent. Law Jour. Feb. 8th, 1878, p. 109; *ante*, p. 45). That was a suit brought by a single creditor of an insolvent corporation to enforce the liability of a stockholder for the unpaid balance of his stock. The shares had been issued in payment for a mining property which the corporation had purchased. The plaintiff did not undertake to impeach as fraudulent this transaction between the corporation and the original shareholders, but simply claimed that the shares of stock had not been paid for, either by the person to whom they were originally issued or by the defendant, the transferee and present holder of the shares. The court, after stating that the proof showed that the shares in question had been paid for precisely as they were originally agreed to be paid for, viz., by a conveyance of the mining property of the corporation, and that the conveyance had been received and recorded by the corporation, says: "Unless this agreement is rescinded or set aside for fraud, how can it be said that the stock has not been paid for? The parties have agreed that it has been paid for, and that agreement is conclusive, unless it is rescinded or impeached for fraud, and this cannot be done unless the attack is directly made. Undoubtedly such an attack could be made while the stock was in the hands of the original takers of it; but it is not so clear that it could be made by a subsequent creditor of the corporation against a transferee of the stock for value, who purchased the same in good faith as full-paid stock, relying upon the records of the corporation,

which showed the shares to have been fully paid for, and the manner in which the payment had been made."

Subsequently the similar case of *Foreman, assignee, etc.* v. *Bigelow et als.* (Cent. Law Jour. Nov. 29th, 1878, p. 430) came before the circuit court for Massachusetts, and it was decided that a *bona fide* purchaser of full-paid shares was not liable to be assessed upon his shares. The opinion of Mr. Justice CLIFFORD is very full, and we forbear going over ground so exhaustively covered in his judgment.

A long line of English cases under the companies acts, referred to in the opinions in the two American cases last cited, had established the principle that stock need not necessarily be paid for in cash—that it might be paid for in money's worth. This doctrine had led to such abuses as to cause parliament to insert in the companies act of 1867 the following provision:

"SEC. 25. Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing and filed with the registrar of joint stock companies at or before the issue of such shares."

The construction and effect of this section came before the court in *Nichols' Case* (Law Rep. 7 Ch. 533). In that case a company issued certificates of shares as fully paid up, when in fact no payment had been made, nor contract registered, under the provisions of the companies act of 1867, section 25. At the date of the winding up of the company, some of these shares were held by N., who had no notice that they were not fully paid up. It was held (reversing the decision of HALL, vice-chancellor) that by the issue of the certificates the company were estopped from alleging that the shares were not paid up, and that N. could not be placed on the list of contributories in respect of them as unpaid shares.

An appeal was taken by the liquidator, and the appeal was dismissed by the house of lords (26 W. R. 819). In giving judgment, Lord CAIRNS, after quoting the aforementioned section

25 of the act of 1867, said: "The effect of the section is very simple. Before the passing of the act it was open to any holder of shares to say, 'I have made a contract that I shall not be called on to pay up the value of these shares;' but the abuse of such contracts led to a statutory provision, making it a condition that no shares be treated as fully paid unless their value is paid in cash, or unless publicity is insured by a written contract duly filed in the manner provided for. If Goulton had been called upon to pay up the value of his shares, this section would have deprived him of any defence; but we have now to consider the case of a *bona fide transfer for value*, and I want to know how the section can effect such a transaction. It leaves untouched the question of payment, and says nothing as to evidence of payment; *but if the company gives a receipt for the amount of the shares, and this receipt passes to a purchaser who does not know that no actual payment has been made, his title must not be prejudiced by the statute.* He receives a representation to the effect that the law has been complied with, and it would paralyze the whole trade in companies' shares if a person taking shares with a representation that they are fully paid up must disregard this assertion and satisfy himself of the fact by personal inquiry, especially as he might have considerable difficulty in obtaining accurate information as to the fact of payment or non-payment. Much was said as to the burden of proof and as to the necessity for showing an absence of notice. If the shares come, in the regular course of business, into the hands of a purchaser for valuable consideration, those who challenge the transaction must prove that such purchaser had notice of the fact." Lords HATHERLEY, SELBOURNE, and BLACKBURN each gave opinions in concurrence, and Lord GORDON concurred without delivering a separate opinion.

As to other defendants, different questions are presented. Certain individuals and counties became original subscribers to the stock of the company. By the charter of the company it is provided that five per cent on each share shall be paid when subscribed, and subsequent payments shall be made upon calls

by the board of directors, who are, however, required to give sixty days notice of each call, and are prohibited from making a call for more than ten per cent at any one time, and from making more than three calls in any one year. On December 2d, 1869, the stockholders voted that no further calls be made upon the original stock subscriptions, and that certificates issue for stock to the extent to which the payment had been made, and that the balance of the subscriptions be cancelled; and on January 25th, 1870, the directors, pursuant to the above-mentioned vote of the stockholders, instructed the secretary "to cancel seventy-three per cent of the original individual and county subscriptions, and to issue certificates of stock to all stockholders whose accounts shall, on March 15th, 1870, show credits to the amount of twenty-seven per centum of the stock now standing in their names." As respects certain individuals and counties made defendants, this was carried out.

The case as to the counties was submitted upon the bill and answers. The averments of the answers are to be taken as true. The counties had paid twenty-seven per cent of their subscriptions. The release was directed by the stockholders themselves. The company was then solvent. The release was made a matter of record in 1870. There was no secrecy and no fraud intended. It is averred in the answers that the original subscriptions had been made before there was any legislative authority for that purpose. The company decided in 1870 that it was "inexpedient to attempt the further collection of calls upon the original individual and county subscriptions to the capital stock," and ordered one share of $25 to issue for each $25 paid, "the stockholders to lose the fraction paid over a full share." This arrangement, it may fairly be inferred, was consented to by every person interested in the company. The amount of the old stock was thus ascertained, and the company had agreed to give the balance of its stock to the contractor for building its road, and undoubtedly the contractor knew of this arrangement and consented to it. The counties and the company acted on the faith of this release. The counties supposed they were out of the company, and subsequently had no voice and took no

part in its affairs. No stockholder in the company ever complained of the action in releasing the counties. No creditors are in existence who were such at the time of the release of the counties, except those claiming under the Fisher contract; and no claim was made against the counties that they were liable as stockholders until 1877, nearly seven years after they were released, and long after the company was bankrupt and practically dissolved. Under the circumstances of the case as set forth in the answers of the counties, we are of opinion that the release was effectual; but if it is not, the counties ought to be protected by the creditors' *laches* from the liability which, at this late day, the creditors are now seeking to enforce against them.

In disposing of the case it may be well briefly to express our views concerning the claim of the creditor based upon the double liability clause of the constitution of 1868. The charter of the railroad company contained this provision:

"SEC. 25. No stockholder in this company shall be in any event responsible for losses of the company to any greater amount or extent in the whole than the amount of stock subscribed for and taken by him."

Section 24 of the charter of the company was as follows: "The said company hereby reserves to itself the right either to accept or reject any act of the general assembly of this state, altering or amending this charter; which shall be decided by a vote of a majority of all the stock, exclusive of that taken by the state, at a meeting of the stockholders regularly convened for that purpose."

Afterwards the constitution of 1868 was adopted, containing the following:

"The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. *Dues from corporations shall be secured by such individual liability of the stockholders and other means as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum at least equal in amount to such*

stock. The property of corporations now existing or hereafter created shall forever be subject to taxation, the same as the property of individuals. No right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

The provisions of the constitution were never accepted by the stockholders.

As respects the claim in the bill based upon the double liability clause of the constitution of 1868, we remain of the opinion heretofore expressed, that the measure of liability of the stockholders, at whatever time they become such, is fixed by the 25th section of the charter, and was not increased by any act of the state not assented to by the corporation.

The purpose of the provision in section 25 of the charter was not to declare a double liability, but to limit the liability of the stockholder to the duty of paying for the stock subscribed or held by him.

The state has passed no act, so far as relates to the liability here sought to be enforced, to carry the constitutional provision into effect.

The defendants contend that the constitutional convention of 1868 did not intend to legislate upon this subject of the personal liability of stockholders in corporations, but to leave the whole subject to future legislatures, with a limitation upon their powers, which limitation was fixed by the clause in question; and that the sole object and purpose of such clause is to declare the *limitation*, and not to *create the liability*. It cannot be denied that there are strong arguments in favor of this view.

If the constitutional provision is not self-executing, the same result is reached as that based upon sections 24 and 25 of the charter.

CALDWELL, J., concurs.

BILL DISMISSED.

Steacy *v.* Little Rock, etc. Railroad Company.

NOTE.—At the same term the following decision was made in the case of

ELISHA ATKINS, in behalf of himself and all other stockholders of the Little Rock and Fort Smith Railroad Company, *v.* JOHN G. STEACY, surviving partner of Peirce, Steacy & Yorston, *et al.*

A bill by a stockholder to impeach a judgment against the corporation was, under the circumstances, dismissed, but without prejudice.

(*Before* DILLON and CALDWELL, JJ.)

Stockholder's Bill to Impeach Judgment against the Corporation.

THE plaintiff in this suit, in behalf of himself and all other stockholders of the Little Rock and Fort Smith Railroad Company, prays that the defendant, Steacy, may be enjoined from proceeding further against the plaintiff and said railroad company, and all the stockholders thereof, in a suit which he, as surviving partner of the firm of Peirce, Steacy & Yorston, has instituted in this court against the plaintiff and certain alleged stockholders, to collect from them the amount of a judgment for $1,041,181.70, which judgment the said Steacy, as such surviving partner, recovered against said company by default on the 8th day of December, 1875, in the circuit court of Pulaski county. The plaintiff also prays that the said defendant may be enjoined from otherwise seeking and endeavoring to enforce the collection and satisfaction of said judgment against the plaintiff and said company and all the stockholders thereof. Then follows a prayer for general relief.

The equities set forth in the bill were denied in the answers, and, a replication having been filed, voluminous proofs were taken. The cause is before the court on final hearing, and was submitted and argued with that of *Steacy and Hurley* v. *Atkins*, impleaded with the Little Rock and Fort Smith Railroad Company, *et als.*

C. W. Huntington, for the plaintiff.

W. H. Winfield, B. F. Rice, and *M. L. Rice*, for the defendants.

DILLON, *Circuit Judge.*—The judgment which the bill seeks to impeach was rendered in the state court. The judgment creditor made that judgment the basis, in part, of an original creditor's bill in equity in *this court* to enforce against the complainant, Atkins, and other stockholders in the Little Rock and Fort Smith Railroad Company, an alleged individual and corporate liability as stockholders. We have held, in that case, that the stockholders were under no individual or double liability, and that, as Atkins was a *bona fide* transferee for value of full-paid stock, he was under no liability, of any kind, to the plaintiffs or other creditors of the company in respect thereto. Accordingly,

a decree has been ordered dismissing the bill as to him. No other stockholder has joined him in the present suit to impeach the judgment of Steacy for $1,041,181.70 rendered by the state court. This bill of Atkins is, in its nature, supplementary or ancillary to the creditors' suit against him as a stockholder. Since it has been determined that he is in no way liable to the creditors of the company in his capacity as a stockholder, he has no interest in the result of the creditors' suit against other stockholders.

The judgment in question, it is to be remembered, was not rendered in this court, but in the *state* court. The learned counsel for Mr. Atkins admitted, in the argument, that an original bill would not lie in this court by Mr. Atkins to impeach the judgment recovered in the state court, and that the basis of Mr. Atkins' present bill was that, since the judgment in the state court was being proceeded upon in this court as the basis, in part, of a creditors' bill, this gave to this court the right to prevent any inequitable or fraudulent use being made of it to his injury.

Since no such injury can, under our decree in the other case, occur, and since no other stockholder has united with Mr. Atkins in seeking to impeach that judgment, a decree will be here entered (without deciding whether that judgment is wholly invalid or is excessive in the amount recovered) dismissing the plaintiff's bill, without prejudice to the right to bring another suit if occasion should arise, and without prejudice, also, to other stockholders in this regard.

CALDWELL, J., concurs.

BILL DISMISSED.

SEIDENBACH, SCHWAB & CO. *v.* J. T. HOLLOWELL and W. C. WATT.

Where a state contains more than one district, and the suit is not of a local nature, the defendant must be sued in the district in which he resides. If all of the defendants in such a suit reside in the same district, suit must be brought therein. It is only when the defendants reside in different districts that suit may be brought in either district (Rev. Stats. sec. 740); and where the defendants, not residing in different districts, were sued in a district in which neither resided, and a writ of attachment was directed to another district, where the owner of the property thereon attached resided, the court, on motion, discharged the property from the writ.

(*Before* DILLON and CALDWELL, JJ.)

Seidenbach *v.* Hollowell.

Suits in States Containing More than One District.—Attachment of Property.—Revised Statutes, Section 740.

PLAINTIFFS, who are citizens of Ohio, sued, in an action to recover money, the two defendants, who are both citizens of the state of Arkansas, and who are inhabitants of the *western* district, in the circuit court for the *eastern* district, and sued out from this court a writ of attachment directed to the marshal for the *western* district, but did not sue out any writ to the eastern district. Both defendants being served, the defendant Watt made no defence, and an interlocutory judgment by default went against him. The other defendant answered, alleging that both defendants were inhabitants of the western district. Both defendants then moved to discharge the attachment on the same grounds set up in the answer. It appeared that some time before the beginning of the suit the defendant Watt had sold all his interest in the goods attached to his co-defendant. The case is before the court on the motion to discharge the attachment.

U. M. Rose, for the motion.

Erb, Summerfield & Erb, contra.

DILLON, *Circuit Judge.*—The state of Arkansas contains two districts. This suit is not of a local nature. The defendants are both residents of the western district. They had been partners, and the firm had been dissolved, and the defendant Hollowell had purchased all of the interest of his co-defendant Watt in goods attached. These goods were in the western district. It is undisputed that Hollowell resided in that district. It is claimed by the plaintiffs that Watt had lost his residence therein. The proof does *not* establish this. But if this were so, the proof shows that he did not reside in the eastern district. Under these circumstances, the defendant Hollowell must be sued in the district in which he resides. Such is the true construction of section 740 of the Revised Statutes. It is immaterial that the service of the summons was made on both defendants in the

eastern district. It is not necessary to consider the effect of the default of Watt. He was not the owner of the property attached. Hollowell never submitted to the jurisdiction of the court.

The present motion is to discharge the property attached. That motion must be sustained, on the ground that there was no authority of law to send the writ of attachment into the western district. State regulations as to where the writ of attachment may run, do not apply. Hollowell alone could move to discharge the property attached under the writ, and his right to this relief is not weakened by his co-defendant joining in the motion.

Such was the opinion of the district judge, and such is also the opinion of Mr. Justice MILLER, to whom the records and the briefs have been submitted, as well as my own.

MOTION SUSTAINED.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

WESTERN DISTRICT OF ARKANSAS.

Ex parte KENYON.

1. By the laws of the United States, the supreme, circuit, and district courts, or the judges thereof, have power to grant the writ of *habeas corpus* within their respective jurisdictions.
2. The Indian country is within the jurisdiction of the western district of Arkansas. A writ of *habeas corpus* issued by the United States court of that district, or the judge thereof, will run in that territory.
3. If a person is held in custody in violation of the constitution, laws, or treaties of the United States—it matters not by whom he is held—the courts of the United States, within their respective territorial jurisdictions, have power to issue the writ of *habeas corpus* to inquire into the cause of his imprisonment.
4. If a person is held in custody by virtue of the judgment of a court of another jurisdiction, and in violation of the constitution, laws, or treaties of the United States, a federal court will interfere by *habeas corpus* and examine the case so far as may be necessary to ascertain that fact.
5. An Indian may abandon his tribe, and, for the purpose of jurisdiction, become a member of the body politic known as citizens of the United States.
6. Actual residence in a place, with the intention that it is to be a principal and permanent residence, makes domicile; and absence from such a place, of a temporary nature, or in the exercise of some particular profession, office, or calling, does not change the domicile.

(*Before* PARKER, J.)

Ex parte Kenyon.

Habeas Corpus.—Writ Runs into the Indian Country.—Power to Release on Habeas Corpus Persons Convicted by the Courts of the Cherokee Nation.

THE petitioner for *habeas corpus* in this case was, upon the 21st day of February, 1878, convicted in the circuit court for Coowees-coowee district, Cherokee Nation, for the crime of larceny, and upon said conviction he was sentenced to be confined in the penitentiary of the Cherokee Nation, at Tallequah, for the period of five years. He prays that a writ of *habeas corpus* may issue, for "that the court of the Cherokee Nation which convicted him had no jurisdiction; that he is a citizen of the United States; that at the time of said arrest, trial, conviction, and sentence, and commission of said alleged offence, he was not a citizen of the Cherokee Nation; that he was at that time a citizen and resident of the state of Kansas; that he is restrained of his liberty and held in custody in violation of the laws and constitution of the United States, and the treaty stipulations lawfully made between the United States and said nation." Upon this statement the writ was issued, and the case came on for hearing, when the evidence taken disclosed this state of the case: The petitioner was born of white parents, who were citizens of the United States, living in the state of Connecticut; that he moved with his parents to the state of Missouri; that while they were living there he left their home and went to the Cherokee Nation, Indian Territory. After remaining there some time he was married to Mollie Cobb, a citizen of the nation; that he lived with her some six years, when she died; that at the time of his marriage his wife had some property, and, among other things, she owned a mare and colt. The petitioner, as the husband of Mollie, took possession of this colt, exercised acts of ownership over it, controlled it, broke it, and used it as he would his own. He bore this relation to this piece of property up to the death of his wife. After her death he took his household goods and his children by his wife Mollie and removed to the state of Kansas. He continued in possession of this mare he is charged with stealing from the time of his marriage until he finally dis-

posed of her in the state of Kansas. This possession was continuous and uninterrupted until that time, with the exception of a short time she was in the possession of a person in Kansas to whom he had pledged her for a debt. At the time he left the Cherokee Nation no letters of administration had been taken out on the estate of Mollie Kenyon, his deceased wife. This is substantially the state of facts as they appear from the evidence in the case.

Marume & Barnes and *T. H. Barnes*, for the petitioner.

W. A. Doew and *H. A. Rogers*, for the Cherokee Nation.

PARKER, J.—The point made by the counsel for the Cherokee Nation, that this court has no authority to issue the writ of *habeas corpus* to run in the Indian Territory, is not, in my judgment, well taken. I should regret to be forced to conclude that in this vast extent of country, having an area of sixty-five thousand square miles and a population of one hundred thousand, those persons who might invoke this writ of right if they were out of that country could not receive its benefits because they were in it. This is the highest right possessed by an American citizen, and in a proper case his right to this writ follows him in the Indian country, as well as elsewhere.

By the laws of the United States, the supreme, circuit, and district courts, or the judges thereof, have power to grant this writ, within their respective jurisdictions, for the purpose of an inquiry into the cause of commitment (Rev. Stats. 1873, secs. 751, 752). This, of course, has reference to their territorial jurisdiction.

The writ of *habeas corpus* will be issued in the territorial jurisdiction of the said courts, or judges thereof, to relieve a person who is in custody in violation of the constitution, or of a law or treaty of the United States. If such person is held in custody in violation of the constitution of the United States, or of a law or treaty thereof, it matters not by whom he is held, the writ will be issued, and the person so held released.

If a person is so held by the authorities of a state, the writ will be issued by the federal courts, and the person released. (*Ex parte Dock Bridges*, 2 Cent. Law Jour. 327.)

If a person is held by virtue of a judgment of a state court which has no jurisdiction of the case, and in violation of the constitution, laws, and treaties of the United States, a federal court will interfere by *habeas corpus* and examine the case so far as may be necessary to see whether the court committing him has done so in violation of the constitution, laws, or treaties of the United States; in other words, it will look into the question of jurisdiction, and will examine such part of the case as may be involved in that question.

The Cherokee Nation does not certainly possess higher rights of sovereignty than the several states of the Union. If they cannot hold a party in custody or restrain him of his liberty in violation of the constitution, laws, or treaties of the United States, neither can it be done by the Cherokee Nation.

Now, this court has no disposition in the slightest degree to trench on the jurisdiction of the courts of the Indian Territory, but, on the contrary, will respect and uphold such jurisdiction, because peace and good order demand that the courts of that country, as well as this court, should possess the full measure of their jurisdiction. No one is more gratified than myself to see criminals punished for their crimes by the courts of that country. But when the question is presented whether one of these courts had jurisdiction, it is my duty, under the laws of the United States, to examine into it.

If the petitioner was tried, convicted, and sentenced by a court of the Cherokee Nation without its having jurisdiction, then he is held in violation of the constitution, laws, and treaties of the United States; but how far will this court examine into the case to ascertain if a person is held contrary to such constitution, laws, and treaties of the United States?

If the person is in custody by virtue of a conviction of a court, the federal court will only examine the case on *habeas corpus* so far as to ascertain whether the court which tried and

sentenced him had jurisdiction of the person and subject matter. In other words, the federal court will look into the case far enough to see whether the court trying it had jurisdiction over the person, the act, and the place where it was committed—it will examine all the elements of the case which are involved in the question of jurisdiction.

The jurisdiction over the person, the place, and the act committed must all concur to give any court of limited jurisdiction the right to try. If either one of these elements of jurisdiction is wanting, the right to try and convict does not exist.

This court, in this proceeding, will only look thus far into this case, but it will look to so much of the case as is necessary to determine if all these requisites of jurisdiction exist. (*Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 3 Otto, 18; *Ex parte Shaffenburg*, 4 Dillon, 274.)

While a federal court will not, on *habeas corpus*, re-examine a mere erroneous decision of a court having jurisdiction of the offence, yet it will go through the whole case, if necessary, to see if such court had jurisdiction both of the subject matter and of the person. Did the court which tried and sentenced the petitioner in this case have jurisdiction of the subject matter and of the person? To determine this it becomes necessary to look into the facts of the case; and in deciding the question of jurisdiction we have a right to do this. There could be no larceny of this mare by the petitioner while she was rightfully and legally in his possession, because a man cannot commit a larceny against his own legal and rightful possession of property. The petitioner had such legal possession of this property during the life of his wife, and after her death, at least until letters of administration were taken out on her estate, which was not done, according to the evidence before me, until after he went to Kansas to live. He parted with possession at one time in the state of Kansas, when he pledged the mare. If such a thing could be possible, under the law, as a husband stealing the wife's property, it could not, by any construction of any law, be held to have been committed in this case until after he parted with the

possession of the property in this way and then took it again and converted it to his own use. But this was done in the state of Kansas. Then the court which tried, convicted, and sentenced the petitioner did not have jurisdiction of the subject matter, as the place where the act was committed was beyond the territorial limits of its jurisdiction. This alone would be conclusive of this case.

But, again, if there was any crime committed at any time, it was committed not only beyond the place over which the Indian court had jurisdiction, but, at the time it was committed, by one over whose person such court did not have jurisdiction; because, to give this court jurisdiction of the person of an offender, such offender must be an Indian, and the one against whom the offence is committed must also be an Indian. (Sec. 2146, Rev. Stats. 1873.) Now, for the purposes of this case, it is not necessary to decide whether the terms of the treaty and the intercourse law include Indians by adoption as well as by birth—that is, Indians belonging to the tribe as well as those belonging to the race—for the principle that is applicable in this case would apply with equal force to either.

What is that principle of the law? It is this: When the members of a tribe of Indians scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States and of the state where they may reside, and, equally with the citizens of the United States and of the several states, subject to the jurisdiction of the courts thereof. (*Ex parte Reynolds*, 18 Albany Law Jour. 8, s. c. *post*, 394; *United States* v. *Abraham Elm*, decided by United States district court of the northern district of New York, opinion by WALLACE, J., Senate Report 268, p. 11, 41st congress, 3d session; 2 Story on the Constitution, sec. 1933; *Dred Scott* v. *Sandford*, 19 How. 404.)

Article 1, section 2, of the Cherokee constitution provides "that whenever ANY CITIZEN shall remove with his effects out of the limits of this nation and become a citizen of any other

government, all his rights and privileges as a citizen of this nation shall cease."

This principle applies to Indians of the full blood or by birth as well as to those by adoption. Suppose it is conceded in this case that Kenyon, the petitioner, had become an Indian; it becomes important to see what was his status at the time of the commission of the offence, if any was committed.

He had left his domicile in the Indian country, and he had gained a domicile in the state of Kansas; in other words, he had abandoned his residence in the Indian Territory. He had moved his household effects from there, and had removed them, with his family, into the state of Kansas, with the intent of remaining in that state — that is, with the intent of having his residence there.

If there is actual residence in a place, with the intention that it is to be a principal and permanent residence, that makes domicile; and absence from such place, of a temporary nature, or in the exercise of some particular profession, office, or calling, does not change the domicile. (*Ennis* v. *Smith*, 14 How. 263.)

This domicile had been acquired at the time of the commission of this offence, if any was committed; hence, the petitioner had clearly abandoned the Indian nation, and was then only subject to the laws of the place of his domicile. He was a citizen of the United States, and was subject to the laws of the state of Kansas. Therefore, the court which convicted him did not have jurisdiction over his person. And if it did not have jurisdiction of either the subject matter or the person of the petitioner, it could not try and sentence him to imprisonment, and such imprisonment would be in violation of the constitution, laws, and treaties of the United States, and this court could hardly be expected to stand by and see an American citizen deprived of his liberty for the period of five years under such circumstances.

Upon the showing made the petitioner must be released from custody.

AND IT IS SO ORDERED.

NOTE. — See *Ex parte Reynolds*, *post*, p. 394.

CULVER, PAGE, HOYNE & CO. *v.* WOODRUFF COUNTY.

1. The act of congress of January 31st, 1877, taking certain counties out of the western district and placing them in the eastern district of Arkansas, is silent as to cases then pending in the western district against residents of these several counties; such cases remain and are to be tried by the United States court for the western district.
2. Where the status of parties is such as to give a federal court jurisdiction, a change of such status pending the suit does not affect the jurisdiction.

(*Before* PARKER, J.)

Federal Jurisdiction.— Transfer of Counties from one Judicial District to another.

THE plaintiffs in this cause file their motion for an order transferring this case to the district court of the United States for the eastern district of Arkansas, for the reason that the county defendant has, by act of congress, been transferred to said eastern district.

This case was pending in this court on the 31st of January, A. D. 1877, the date of the passage of the law of congress transferring Woodruff, with other counties in the state, to the eastern district of Arkansas. Woodruff county, prior to that time, was in the western district. The plaintiffs were non-residents, and this court at the time of the bringing of this suit had jurisdiction of the same.

Yonley & Whipple and *J. H. Clendenning*, for the plaintiffs.

PARKER, J.—On the question raised by this motion, the court holds the law to be, that, when jurisdiction has once attached, no subsequent change in the relation or condition of the parties in the progress of the cause will deprive the court of jurisdiction over the cause, or over any proceeding touching the execution of the judgment. It is clear that the jurisdiction depends on the state of things existing at the time the action is brought, and that after it is once vested it cannot be ousted by subsequent events.

Now, if a suit is brought in this court by a non-citizen of the state against a citizen of the state and resident of the district, and the non-citizen afterwards becomes a citizen of the state pending the suit, or the resident of the district becomes a non-resident before the determination thereof, neither one of these changes in the status of the parties will divest the court of jurisdiction, because the same has attached, and the condition or relation of the parties at the time of bringing the suit is the test of jurisdiction.

The case of this county presents a case of a change of residence from this judicial district to another by operation of law since this suit was brought, and after jurisdiction had attached. This principle is directly decided in the case of the *United States* v. *Dawson* (15 How. 601). This was a case that went to the supreme court of the United States from this district, or, rather, what had then just become the eastern district of this state. A new district had, in the year 1851, been created, called the western district of Arkansas, consisting of nine counties in the state and the Indian country, and a case was pending in the old district from the Indian country. It was claimed for the defendant that he could not be tried in the eastern district, but that his case must be sent to the other district. The court says: "We do not, therefore, perceive any objection to the jurisdiction of these courts over cases pending at the time the change took place, civil and criminal, inasmuch as the erection of the new district was not intended to affect it in respect to such cases, nor has it, in our judgment, necessarily operated to deprive them of it."

The law was silent as to cases pending in the old district. Therefore, the effect of the decision is, that, unless the law changing the district provides that pending cases shall be removed to the new district, the mere passage of the law does not work a removal.

The point raised by the motion in this case is directly decided in the case of *Rhodes* v. *Selin* (4 Wash. 725). The same question is inferentially decided in *Dunn et al.* v. *Clark et al.* 8 Pet.

1; *Mollan et al.* v. *Torrance*, 9 Wheat. 537; *Morgan's Heirs* v. *Morgan*, 2 Wheat. 110; *Hatfield* v. *Bushnell*, 1 Blatchf. 392.

The law in this case being silent as to cases pending in the district court for the western district of Arkansas against counties which have been placed by its terms in the eastern district, and against persons living in these counties, they must be tried in that court whose jurisdiction had attached at the time of the passage of the law.

Congress, of course, could have provided for a transfer of these cases. It has not done so. The mere passage of the law does not work a removal of the cases.

MOTION OVERRULED.

Ex parte REYNOLDS.

1. Indians who maintain their tribal relations are the subjects of independent governments, and, as such, not in the jurisdiction of the United States, within the meaning of the constitution and laws of the United States, because the Indian nations have always been regarded as distinct political communities, between which and our government certain international relations were to be maintained. These relations are established by treaties to the same extent as with foreign powers. They are treated as sovereign communities, possessing and exercising the right of free deliberation and action, but, in consideration of protection, owing a qualified subjection to the United States.
2. When the members of a tribe of Indians scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States, and, equally with the citizens thereof, subject to the jurisdiction of the courts thereof.
3. The condition of the offspring of a union between a citizen of the United States and one who is not a citizen, *e. g.*, an Indian living with his people in a tribal relation, is that of the father. The status of the child in such case is that of the father. The rule of the common law and of the Roman civil law, as well as of the law of nations, prevails in determining the status of the child in such case.

(*Before* PARKER, J.)

Ex parte Reynolds.

Status of Indians and their Offspring.— Criminal Jurisdiction of the Federal Courts over Indians.— Who is an Indian?— Habeas Corpus.

APPLICATION for *habeas corpus* for the discharge of James E. Reynolds, committed for murder. The facts appear in the opinion.

W. H. Clayton, United States district attorney, for the government.

PARKER, J.—In this case the petitioner asks to be discharged on the ground that the evidence taken before the United States commissioner shows that this court has no jurisdiction. In order to make jurisdiction complete in this court, the court must have the right under the law to take cognizance of the offence. Such right, as far as this court is concerned, depends upon three things: First, the nature of the offence; second, the status as to nationality of the person committing it and the person against whom it is committed; and, third, the place where it is committed. This is so, because the criminal jurisdiction of the courts of the United States is limited, and is generally dependent upon the nature of the offence and the place where the same is committed, and the jurisdiction of this court is dependent upon all three of the requisites set out above. In order to give this court jurisdiction of the crime of murder, of which the defendant stands charged, it must appear that the crime was committed in the Indian country, and that the person who committed it is not one of those persons known as an Indian, or, if he is an Indian, that the person upon whom the crime was committed was not an Indian. If the person charged and the person upon whom the crime was committed are both Indians, under section 2446 of the intercourse law (Rev. Stats. of 1873, p. 376), this court has no jurisdiction, because, by the terms of said section, the general laws of the United States defining crimes and providing for their punishment do not extend to "offences committed by one Indian upon the person or property of another

Indian;" but the same are left by the laws of the United States to be dealt with by the Indian authorities.

It is claimed in this case that both Reynolds, the defendant, and Puryear, the man who was killed, were Indians. If so, that ends the power of this court to hold the defendant in custody. It is not contended that Reynolds and Puryear are Indians by birth—that is, that they belong to the race generally, or to the family of Indians; but it is claimed that they are Indians in law, by reason of their marriage to persons who do belong to the family of Indians—who belong to the Choctaw nation or tribe of Indians.

It is provided by the 38th article of the treaty of 1866 between the Choctaw Nation and the government of the United States, that "every white person who, having married a Choctaw or Chickasaw, resides in the said Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of said nation, and shall be subject to the laws of the Choctaw and Chickasaw Nations according to his domicile, and to prosecution and trial before their tribunals, and to punishment according to their laws, in all respects as though he was a native Choctaw or Chickasaw." This article of the treaty permits a citizen of the United States to place himself beyond the jurisdiction of the laws of the United States by joining himself in marriage to an Indian who is of the Choctaw or Chickasaw tribe, and by residence in their country. Before a citizen —that is, one of the sovereign people, a constituent member of the sovereignty—can expatriate himself under this section of the treaty, and place himself beyond the jurisdiction of the courts of the United States, there must be a concurrence of certain things, to-wit, marriage to a Choctaw or Chickasaw, and residence in the country of one or the other of these tribes. It is contended in this case that both Reynolds and Puryear have married women who are Choctaws. Then the material inquiry in this case is, Were the wives of Reynolds and Puryear Choctaw Indians? In order to give this court jurisdiction, one of these women must have been a member of the body politic which is composed of

the citizens of the United States, and the members of which are subject to the laws of the United States; in other words, she must have been a citizen of the United States. What does the evidence show? It shows that the wife of Reynolds was born in the state of Mississippi, and that her mother had Indian blood in her veins, and that her father was a full-blooded Choctaw. If we invoke the principle that when the members of an Indian tribe scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States, and, equally with the citizens thereof, subject to the jurisdiction of the courts thereof (Senate Report 268, p. 11, 41st congress, 3d session; 2 Story on the Constitution, 655; 19 How. 403)—it may, to say the least of it, become a very serious question whether Mrs. Reynolds is, under the evidence in this case, a Choctaw Indian, notwithstanding her Indian blood. But suppose it is conceded that she is an Indian of the Choctaw tribe, that is not enough.

Reynolds being a white man by nationality, by birth, and, if at all, only an Indian by marriage, in order to take away the right of this court to try him for the alleged killing of Puryear, he (Puryear) must also be an Indian, either by blood or marriage; because the court still has jurisdiction if one of the parties—either the party committing the offence or the party against whom it is committed—is one of the white race, or belongs to the nationality of the people of the United States. Is Puryear an Indian? He is not by blood. Is he by marriage? What is the status of his wife? If she is not an Indian in law, then he is not made a Choctaw by marriage with her; and if not, the question of his residence at the time he was killed cuts no figure in the case, for if he was a white man in law, and was killed in the Indian country by Reynolds, although Reynolds may have been an Indian, this court has jurisdiction under the treaty. If either marriage with an Indian or residence in the Indian country is wanting, white persons are not Choctaws. What does the evidence show as to the nationality of Mrs. Puryear? It shows

that her mother had some Indian blood in her veins; that her father also had some Indian blood, but that her paternal grandfather was a full-blooded white man; that she was born and raised in the state of Mississippi, and married to Mr. Puryear in that state. Now we must find to what nationality she belongs — if she is a citizen of the United States or a Choctaw woman. In order to do this we must find some rule to guide us in tracing her nationality. If we desire to do this correctly we must look to the status of the Indian people. They are not citizens, although born in the United States; at least the courts have always so held. Whether the government can subject them to its jurisdiction is not a material question here. It has not been done in the case of an offence committed by one Indian upon another; and, under the laws as they now stand, not being subject to the jurisdiction of the United States, they are not citizens thereof. Under the laws as they now are, these Indians, if members of a tribe, are not citizens or members of the body politic. The tribes are permitted by the United States to exist as distinct nations, or as distinct political societies, separated from others, capable of managing their own affairs and governing themselves.

In the case of *Jackson* v. *Goodall* (20 Johns. 193), the court, Mr. Justice KENT delivering the opinion, says: "In my view they (the Indians) have never been regarded as citizens or members of our body politic." * * * Again: "Still they are permitted to exist as distinct nations. * * * The Indians, though born within our territorial limits, are considered as born under the dominion of their own tribes. * * * In the treaties made with them we have the forms and requisites peculiar to the intercourse between friendly and independent states, and they are conformable to the received institutes of the law of nations. What more demonstrable proof can we require of existing and acknowledged sovereignty?"

In *The Cherokee Nation* v. *The State of Georgia* (5 Pet. 1), Chief Justice MARSHALL, among other things, says: "Is the Cherokee Nation a foreign state in the sense in which that term

is used in the constitution? The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. *So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful.* They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violations of their engagements or for any aggressions committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of the government plainly recognize the Cherokee Nation *as a state*, and the courts are bound by those acts."

Mr. Justice JOHNSTON, who delivered a separate opinion in this case, states the condition of the Indian tribes: "Their right to personal self-government has never been taken from them, and such a form of government may exist, though the land occupied be in fact that of another. The right to expel them may exist in that other, but the alternative of departing and retaining the right of self-government may exist in them, and such they certainly do possess. It has never been questioned." * * *

In *Worcester* v. *The State of Georgia* (6 Pet. 515), Chief Justice MARSHALL again reviewed the relations existing between our government and the Indian tribes. In speaking of the relations of the Cherokee Nation to the United States under the treaties made with them, he says: "*This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character and submitting as subjects to the laws of a master.*" * * * Again: "From the commencement of our government congress has passed acts to regulate trade and intercourse with the Indians,

which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All of these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities—having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries; which is not only acknowledged, but guaranteed, by the United States." And again: "The very term 'nation,' so generally applied to them, means a people distinct from others. The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers which are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having a definite and well-understood meaning. We have applied them to Indians as we have applied them to other nations of the earth; they are applied to all in the same sense."

Again, in the case of *The Kansas Indians* (5 Wall. 737), the supreme court of the United States hold: "If the tribal organization of Indian bands is recognized by the political department of the national government as existing—that is to say, if the national government makes treaties with and puts its Indian agents among them, paying subsidies and dealing otherwise with 'head men' in its behalf—the fact that the primitive habits and customs of the tribe, when in a savage state, have been largely broken into by their intercourse with the whites, in the midst of whom, by the advance of civilization, they have come to find themselves, does not authorize a state government to regard the tribal organization as gone, and the Indians as citizens of the state where they are, and subject to its laws."

The supreme court of the United States again gave its views of the status of the Indian in the case of *Dred Scott* v. *Sandford* (19 How. 403). Speaking by the chief justice, the court declares: "That the Indian race formed no part of the colonial

communities, and never amalgamated with them in social connections or in government. But, although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes, and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion; but that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper; and neither the English nor the colonial governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory until the tribe or nation consented to cede it. These Indian governments were regarded and treated as foreign governments—as much so as if an ocean had separated the red man from the white; and their freedom has constantly been acknowledged, from the time of the first emigration of the English colonies to the present day, by the different governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war; and the people who compose these Indian political communities have always been treated as foreigners not living under our government. * * * But they may, without doubt, like the subjects of any other foreign government, be naturalized by the authority of congress, and become citizens of a state and of the United States; and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people."

Now, what is the principle to be deduced from all of these decisions of the supreme court? Why, that in cases where the United States has not, by its legislative or other acts, incorporated these people into the political body known as the people of the United States, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government, they are not citizens. These nations or tribes may not be absolutely independent powers—they may be domestic, dependent nations; but as long as the government of the United

States, through its legislative department, continues to treat them as beyond the jurisdiction of the United States, so long they must be held to be *quasi* foreign nations, whose citizens are not regarded as American citizens, and not subjected to the full responsibility of such citizens. If the government of the United States has never recognized them as subject to its jurisdiction, and they have consequently never been treated as citizens, they occupy the same position before the law as though they were citizens of a power entirely independent of us, or were the people who were the citizens of a foreign power. If this be true, when the question arises as to what people a person belongs, what rule is to govern in the solution of the problem?

There is no statute law on the subject. We find that the question before the country at one time, as to who was a white person and who was a member of the African race, was solved by legislative or constitutional enactments defining the nationality of persons according to the quantum of white or African blood in the veins of the persons.

These laws were all enactments of the states, and had reference to the African race alone. The United States never had any statute law on the subject (and has not now) with regard to persons who are not subject to its jurisdiction. Now, in this case, as the 38th article of the treaty only permits an American citizen, or a white person, to expatriate himself—to throw off his allegiance to the government of the United States—and place himself beyond the jurisdiction of its courts by marriage to a Choctaw and residence in their country, we must somewhere find a rule to define who is a Choctaw, in a case where there is mixed parentage. Does the quantum of Indian blood in the veins of the party determine the fact as to whether such party is of the white or Indian race? If so, how much Indian blood does it take to make an Indian, or how much white blood to make a person a member of the body politic known as American citizens? Where do we find any rule on the subject which makes the quantum of blood the standard of nationality? Certainly not from the statute law of the United States; nor is it to be found

in the common law. In the case of the *United States* v. *Sanders* (Hempst. 486), the court held that the quantum of Indian blood in the veins *did not determine the condition of the offspring of a union between a white person and an Indian;* but further held that the condition of the mother did determine the question. And the court referred to the common law as authority for the position that the condition of the mother fixed the status of the offspring. The court is sustained in the first position by the common law, and also in the last position, if applied to the offspring of a connection between a freeman and a slave, upon the principle handed down from the Roman civil law, that the owner of a female animal is entitled to all her brood, according to the maxim *partus sequitur ventrem.* But by the common law this rule is reversed with regard to the offspring of free persons. Their offspring follows the condition of the father, and the rule *partus sequitur patrem* prevails in determining their status. (1 Bouvier's Institutes, 198, sec. 502; 31 Barb. 486; 2 Bouvier's Law Dictionary, 147; *Shanks* v. *Dupont,* 3 Pet. 242.) This is the universal maxim of the common law with regard to freemen —as old as the common law, or even as the Roman civil law, and as well settled as the rule *partus sequitur ventrem*—the one being a rule fixing the status of freemen; the other being a rule defining the ownership of property—the one applicable to different political communities or states, whose citizens are in the enjoyment of the civil rights possessed by people in a state of freedom; the other defining the condition of the offspring which had been tainted by the bondage of the mother.

No other rules than the ones above enumerated ever did prevail in this or any other civilized country. In the case of *Ludlam* v. *Ludlam* (31 Barb. 486), the court says: "The universal maxim of the common law being *partus sequitur patrem,* it is sufficient for the application of this doctrine that the father should be a subject lawfully, and without breach of his allegiance beyond sea, no matter what may be the condition of the mother."

The law of nations, which becomes, when applicable to an existing condition of affairs in a country, a part of the common

law of that country, declares the same rule. Vattel, in his Law of Nations (page 101), says: "As the society cannot exist and perpetuate itself otherwise than by the children of the citizens, these children naturally follow the condition of their fathers and succeed to their rights. * * * The country of the father is, therefore, that of the children, and these become true citizens merely by their tacit consent." Again, on page 102, Vattel says: "By the law of nature alone, children follow the condition of their fathers and enter into all their rights." This law of nature, as far as it has become a part of the common law, in the absence of any positive enactment on the subject, must be the rule in this case.

These Indians are freemen; the paternal ancestors of Mrs. Puryear were freemen. The rule applicable to the offspring of freemen is certainly applicable here, if the status of the Indian nations is as declared so often by the supreme court of the United States, because, if that be their true status as tribes or nations, the question is to be solved in the same way as if one parent was a citizen of the United States and the other a citizen of a foreign nation.

The evidence in the case showing that the paternal grandfather of Mrs. Puryear was a white man, living in the state of Mississippi, and not with an Indian tribe—a citizen of the state of Mississippi and of the United States—the principles above enumerated make her father a citizen of the United States, and subject to the jurisdiction of the courts thereof. The same principles would make Mrs. Puryear a citizen of the United States, and subject to the jurisdiction of the courts thereof. That being the case, Mr. Puryear was married to a woman who was legally a member of the white race, or of the body politic known as citizens of the United States. He did not, therefore, become a Choctaw by marriage, but was a citizen of the United States, and being killed in the territorial jurisdiction of this court, it has jurisdiction, and the writ must be dismissed and the defendant remanded to the custody of the marshal.

ORDERED ACCORDINGLY.

UNITED STATES v. REESE.

1. The Cherokee tribe of Indians hold their lands by a title different from the Indian title — by occupancy. They derived it by grant from the United States. *It is a base, qualified, or determinable* fee, without the right of reversion, but only a possibility of reversion, in the United States.
2. The lands of the Cherokee tribe of Indians cannot, therefore, be held to be "lands of the United States," in the sense of the language used in section 5388 of the Revised Statutes of the United States.
3. Penal statutes are to be construed strictly. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused.
4. The treaty-making power of the United States can make a sale or grant of land to an Indian tribe without an act of congress.
5. Congress has no constitutional right to interfere with rights under treaties, except in cases purely political.

(*Before* PARKER, J.)

Indian Lands.—"Lands of the United States."—Cutting Timber Thereon.— Grant of Lands by Treaty.—Penal Statutes.

THE defendant is charged, by an information preferred by the district attorney, and filed on the 5th of April, A. D. 1879, with violating section 5388 of the statutes of the United States, "by unlawfully cutting timber on lands situated and lying in the Cherokee Nation, in the Indian country, in the western district of Arkansas, which said lands, in pursuance of law, may be reserved and purchased by the United States for military or other purposes."

To the information the defendant, by his counsel, filed a demurrer, setting up (1) that the matters and things stated in the information do not constitute an offence, and (2) that this court has no jurisdiction of the offence charged in said information.

W. H. Clayton, United States district attorney, for the government.

Duval & Cravens, for the defendant.

PARKER, J.—The first ground of the demurrer is the only one I propose to notice; because, if this act charged against the defendant is one which is declared an offence by the section referred to in the statement of the case, I have no doubt the court has jurisdiction. Of course, if it is no offence, then it has no jurisdiction to try and punish, because there is nothing to which jurisdiction can attach. It is conceded in this case that the timber charged to have been cut by defendant was cut on lands formerly ceded by the United States to the Cherokee tribe of Indians.

There are certain things which make up this offence. These are the elements which enter into it, and go to constitute it. They consist of the positive acts of the party charged, as well as the existence of other facts, all of which must exist before it can be held that the defendant is subject to the penalty prescribed by the law.

In this case there must be a cutting of the timber by the defendant. It must be unlawfully done—that is, done wrongfully, without authority of the United States or her agents. These are the positive acts of the defendant. In addition thereto, the cutting must be done on lands of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes.

The pertinent question in this case is, Was this done upon "lands of the United States?" It is conceded that it was done upon lands which have been heretofore granted by the United States to the Cherokee Indians. Does the United States still have such a title to these lands as that they can be called lands of the United States in the sense of the law upon which this prosecution is based? If she has such a title thereto, this act of the defendant is a penal offence, and he is amenable to the punishment prescribed by the section above referred to. If she does not have such a title, this prosecution must fail, as being an act, although a gross outrage and a grievous wrong, not prohibited by law.

To determine the question whether these are lands of the

United States, requires a consideration of the title by which they are held by the Cherokee nation. To any one who has given any attention to this subject, it presents a question not free from doubt or intrinsic difficulty. The Cherokee nation of Indians derived their title to their lands from the United States by grant. This grant is by virtue of different treaties made between them and the United States. By the 2d article of the treaty of May 6th, 1828 (Rev. Ind. Treat. 54), "the United States agrees to possess and guarantee to the Cherokees, *forever*, seven millions of acres of land, and this guarantee is hereby solemnly pledged." This land is a part of the country now occupied by them. On the 28th of May, 1830, congress passed a law, the 1st section of which provided that "it shall and may be lawful for the president of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, not included in any state or organized territory, and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove, and to cause each of said districts to be so described by natural or artificial marks as to be easily distinguished from every other." Section 3 of said act provides "that in the making of any such exchange or exchanges, it shall and may be lawful for the president solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them and their heirs or successors the country so exchanged with them, and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided*, always, that such lands shall revert to the United States if the Indians become extinct or abandon the same." (Vol. 8 Laws of U. S. 342.)

By section 1 of the treaty of the 14th of February, 1833, concluded between the Cherokees and the United States (Rev. Ind. Treat. 63), "the United States agrees to possess the Cherokees, and to guarantee to them forever, and that guarantee is

hereby pledged, of seven millions of acres of land, to be bounded" as set out in said article. By the 3d article of the treaty of the 29th of July, 1835, it is provided "that the lands ceded by the treaty of the 14th of February, 1833, including the outlet and those ceded by this treaty, shall all be included in one patent executed to the Cherokee nation of Indians by the president of the United States, according to the provisions of the act of May 28th, 1830." In pursuance of the terms of this treaty, the president of the United States, on the 31st day of December, 1838, executed to the Cherokee nation a patent for the seven millions of acres of land, for the outlet west, as well as the eight hundred thousand acres of land granted to them by the treaty of the 29th of July, 1835.

The granting clause of this patent is as follows: "Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee nation the two tracts of lands so surveyed and hereinbefore described, containing in the whole thirteen million three hundred and seventy-four thousand one hundred and thirty-five and fourteen one-hundreths acres; *to have* and *to hold* the same, together with all the rights, privileges, and appurtenances thereunto belonging, to the said Cherokee nation forever; * * * subject, also, to all the rights reserved to the United States in and by the articles heretofore recited, to the extent and in the manner in which the said rights are so reserved, and subject, also, to the condition provided by the act of congress of the 28th of May, 1830, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokees become extinct or abandon the same."

Now, the question arises, what kind of a title do these several treaties, and this law of 1830, give the Cherokees to their lands? If it were not for the treaty of 1835, the treaty of 1833 is broad enough in its terms to convey a fee-simple title. This treaty is subsequent in date to the act of 1830, which contained the clause that the lands should revert to the United States if the Indians

"become extinct or abandon the same." There is no limitation to the title conveyed by the United States under the treaty of 1833. If such treaty is inconsistent with the law of 1830, it repealed so much of it as was inconsistent. Besides, the act did not make any grant; it only provided that it might be done.

The treaty-making power was not limited by its terms, as the authority to make a treaty with the Indian tribes was one which the treaty-making power derived from a source higher than an act of congress, to-wit, the constitution. And by this power the president and senate of the United States could make a treaty with any Indian tribe, extending to all objects which, in the intercourse of nations, had usually been regarded as the proper subject of negotiation and treaty, if not inconsistent with the nature of our government, and the relation between the states and the United States. This treaty-making power could make a sale or grant of land without an act of congress. It could lawfully provide that a patent should issue to convey lands which belong to the United States without the consent of congress, and in such case the grantee would have a good title. (*Holden* v. *Joy*, 17 Wall. 247; *United States* v. *Brooks*, 10 How. 442; *Meigs* v. *McClung*, 9 Cranch, 11.)

Congress has no constitutional right to interfere with rights under treaties, except in cases purely political. (*Holden* v. *Joy*, 17 Wall. 247; *Wilson* v. *Wall*, 6 Wall. 89; *Insurance Company* v. *Carter*, 1 Pet. 542; *Doe* v. *Wilson*, 23 How. 461; *Mitchell* v. *United States*, 9 Pet. 749; *The Kansas Indians*, 5 Wall. 737; 2 Story on Constitution, sec. 1508; *Foster* v. *Neilson*, 2 Pet. 254; *Crews* v. *Burcham*, 1 Black, 356; *Worcester* v. *Georgia*, 6 Pet. 562; *Blair* v. *Pathkiller*, 2 Yerg. 407; *Harris* v. *Burnett*, 4 Blackf. 369.) If title passed by the treaty of 1833, there were no restrictions upon it.

But it may be asked how could this title be held to be a title in fee when the word *heirs* was not used in the grant. At the common law, by a rule which in this country is purely technical, the word *heirs* is necessary. But this rule did not apply to grants to a corporation aggregate. The fee passed without the

words *heirs or successors*, because in judgment of law a corporation never dies, and is immortal by means of perpetual succession. (4 Kent's Commentaries, 7.) This tribe of Indians may be regarded under the law as a corporation aggregate. It has been claimed by some that this title obtained under the treaty of 1833 could not be a fee-simple title because it was taken under the general law prohibiting the alienation of Indian lands, and that this was such a restriction upon the title as to take away its fee-simple character. But this act was not in existence until the 30th day of June, 1834. But it is said the treaty of 1833 did not operate to convey the lands described therein. This point is not entirely free from doubt. But it does seem to me that the words used in the 1st section of the treaty are sufficient to operate as a cession of the land mentioned in the treaty: "The United States agrees to possess the Cherokees, and to guarantee to them forever, and that guarantee is hereby pledged, of seven millions of acres of land." The United States agrees to possess what? Why, the land described. And to guarantee what, and for how long? Why, not the possession, but the land, and forever. It does seem to me that this was a cession of the land described. This opinion is confirmed by the language of the 2d article of the treaty of 1835. (Rev. Ind. Treat. 68.) It is: "The United States also agrees that the lands above, ceded by the treaty of February 14th, 1833." This language is a recognition of the cession of the lands. If they had already been ceded to the Cherokees forever by the treaty of 1833, then the agreement by the United States, by the 3d article of the treaty of 1835, to give them a patent for these lands, according to the provisions of the act of congress of May 28th, 1830, was a mere *nudum pactum*. It was an attempt to place a restriction upon a title which had already passed, and which, according to the 1st section of the treaty of 1833, was to be evidenced by patent.

I am unable to see what consideration passed to the Indians to induce them to take a title of less grade, under the 3d article of the treaty of 1835, when they, by the terms of the 1st article of the treaty of 1833, had one of a higher grade. Now, unless

the treaty was afterwards modified by some other treaty or law, and my construction of it is the correct one, it cannot be held that these lands of the Cherokees are "lands of the United States," in the sense of the language of section 5388 of the general statutes. Although the construction may be at fault, still it throws some light on what must have been intended by the treaty of 1835.

But suppose the condition contained in the patent is valid—let us see what effect that has upon the title. The condition is that the lands *revert* to the United States if the said Cherokees become extinct or abandon the same. Now, the first of these conditions is one which would be silently engrafted on the grant independent of any express words. When there is a grant, and the grantee and his heirs become extinct, the land escheats to the state, whether the grantee be an individual or a body of individuals. In an ordinary patent, absolute from the government, the implied right of escheat to the sovereign lies behind the patent. In this case it is expressed.

Therefore, that expressed condition does not take away the character of a fee-simple title. But the other one, against abandonment, does. This leaves the title less than a fee. But what character does it have? Blackstone (book 2d, chap. 7, p. 109) says: "A base or qualified fee is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As in the case of a grant to A. and his heirs, tenants of the manor of Dale. In this instance, whenever the heirs of A. cease to be tenants of the manor the grant is entirely defeated. * * * This estate is a fee, because by possibility it may endure forever in a man and his heirs. Yet, as that duration depends upon the concurrence of collateral circumstances which qualify and debase the purity of the donation, it is, therefore, a qualified or base fee." Chancellor KENT (vol. 4, p. 10, of his Commentaries) says: "A qualified, base, or determinable fee is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its contin-

uance or extent. It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, and not merely a freehold." If the condition attached to the fee is one which is certain to happen, *then there is a reversion.* If such condition is one which may never happen, there is not a reversion, *but only a possibility of reversion.* (4 Kent's Commentaries, 9; 1 Washburn on Real Property, p. 90, pl. 86, 87, 88.) Mr. Washburn (in pl. 88, vol. 1, p. 90) says: "If the estate be to A. and his heirs till B. comes back from Rome, the right to have it when he comes back is not a reversion, but a mere *possibility.* He may not come back, and if he were to die before he came back, the estate would become absolute in the *grantee.*"

Here is a grant made to the Cherokees, having conditions which may never happen, and, in view of the facts that the Cherokee Indians are not likely to become extinct, and that they are now occupying the lands, with no intention of abandoning the same, there is only a remote possibility of either event happening. In such case there is not an absolute *right of reversion* in the United States, but only a possibility of reversion. There is a broad distinction between the rights of the grantee in case of a reversion and a mere possibility of reversion. When there is only a possibility of reversion, all the estate is in the feoffee, notwithstanding the qualification. (4 Kent's Commentaries, 11; 2 Bouvier's Institutes, sec. 1699, p. 220; 1 Washburn on Real Property, pl. 89, p. 90.)

This Indian title being a base, qualified, or determinable fee, with only *the possibility of a reversion,* and not the right of reversion, in the United States, all the estate is in the Cherokee nation of Indians. I cannot, therefore, see how these lands, which have been depredated upon, can be held to be "lands of the United States," in the sense of the language used in section 5388.

It must be remembered that this is a penal statute, and it must, therefore, be construed strictly. In the office of the interpretation of statutes, courts, particularly in statutes that create crimes, must closely regard and ever cling to the language which the

legislature has selected to express its purpose. And when the words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular, and general signification. Statutes enjoin obedience to their requirements, and, unless the contrary appears, it is to be taken that the legislature did not use the words in which its commands are expressed in any unusual sense. Therefore, the law is settled that in construing statutes the language used is never to be lost sight of, and the presumption is that the language used is used in no extraordinary sense, but in its common, every-day meaning. The legitimate function of courts is to *interpret* the legislative will, not to supplement it or to supply it. The judiciary must limit themselves to explaining the law; they cannot make it. It belongs only to the legislative department to create crimes and enjoin punishments. Accordingly, courts, in the construction of statutable offences, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, as otherwise they may hold an act or an omission to be a crime, and punish it, when, in fact, the legislature had never so intended. (*United States* v. *Clayton*, 2 Dillon, 219.) Statutes creating crimes will not be extended by judicial interpretation to cases not plainly and unmistakably within their terms. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. (*United States* v. *Whittier*, 7 Cent. Law Jour. 51, s. c. *ante*, p. 35; *United States* v. *Morris*, 14 Pet. 694; *United States* v. *Wiltberger*, 5 Wheat. 76; *United States* v. *Sheldon*, 2 Wheat. 119; *United States* v. *Clayton*, *supra*.) Therefore, in the face of these principles of the law so well sustained by authorities, if it does not clearly appear to the judicial mind that these lands granted to the Cherokee Indians are "lands of the United States," in the sense intended by its makers to be attached to the statute, then the act of the defendant is not one covered by the terms of the law, and he is not subject to its penalty. It is to be regretted that it cannot be held to be an

offence, as the complaints of depredations upon the timber of the Indian lands are constantly being made to officers of this court. There is a class of men on the borders of the Indian country who revel in the idea that they have an inherent, natural right to steal from the Indians. This right is not to be questioned. They think it a tyrannical use of authority if they are interfered with.

There should be a law enacted, the penalty of which would teach persons that Indians have rights which should be respected as well as the rights of citizens. This is with the law-making power, and not with this court. That it is the right of congress to pass a law protecting the timber on the lands of these people, is clear; the duty of congress to do so, in the face of the pledges of the government of the United States, made by her treaties and her laws, to protect these Indians from unlawful intrusions from without, and from violations of their rights by any and all persons, is manifest.

If the law-making power will give us a law, we will lay its mailed hand upon its violators in such a way that the timber in that Indian Territory will be protected from the rapacity of those who are now stealing it. It remains with us to execute the law, not to make it. And it is with regret that we must hold in this case that the offence, for the reasons already given, is not within the terms of section 5388.

The demurrer is, therefore, sustained.

JUDGMENT ACCORDINGLY.

THE NATIONAL BANK OF WESTERN ARKANSAS v. SEBASTIAN COUNTY.

1. The jurisdiction of the federal courts is derived from the constitution and laws of the United States, and the same cannot be enlarged, diminished, or affected by state laws. Such jurisdiction over controversies cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.

2. The constitution of the United States prohibits the states from passing any law which impairs the obligation of contracts. The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. The constitution embraces those laws alike which affect its *validity, construction, discharge, and enforcement.*
3. An act of a state legislature which provides that counties are no longer corporations—that they cannot be sued—is void as to obligations legally issued by such counties when the law of the state provided they could be sued, when set up against a party seeking a remedy upon the obligations of a county in a federal court, because the state legislature cannot take away the right of a holder of such county obligations to sue in a federal court when such right is given him by the constitution and laws of the United States, and because such a law impairs the obligation of such contracts.

(*Before* PARKER, J.)

Constitutional Law.—Obligation of Contracts.—Right to Sue a County in the Federal Courts, existing at time the Contract was made, cannot be taken away, as respects such Contracts, by a Subsequent State Enactment.

THIS is an action brought by plaintiff on several county warrants issued at different times by defendant county. Suit was commenced on the 4th of January, 1879. To the complaint the defendant, by its attorney, on the 5th of May, A. D. 1879, filed an answer, setting up as a defence that since the commencement of this action, to-wit, on the 27th of February, 1879, the legislature of the state of Arkansas passed a law repealing certain sections of the general law of the state providing that the several counties thereof could sue and be sued; the law of the state, in other words, takes away the suable character of the counties.

To this answer the plaintiff filed a general demurrer, alleging "that the facts set forth in said answer are not sufficient to constitute a defence to the plaintiff's cause of action;" and upon this demurrer the case was submitted to the court.

Messrs. Clendenning and *Sandels*, for the plaintiff.

R. B. Rutherford, for the defendant.

PARKER, J.—The plaintiff in this action had a right, at the time suit was brought, to bring its action in a district or circuit court of the United States. (Secs. 629 and 563 of the Rev. Stats.; *Kennedy* v. *Gibson*, 8 Wall. 506; *Cadle* v. *Tracy*, 11 Blatchf. 101.)

The county, at the time of the issue by it of the several warrants in suit in this case, had a right to issue such warrants (sec. 605, Gantt's Digest); and when such warrants were issued by the county they were evidences of a promise by the county to pay whoever might be the holder thereof. They were so far negotiable as to pass by delivery, and only lacked that commercial character given by the law merchant to certain kinds of commercial instruments, which, when they are received by a *bona fide*, innocent holder for value before they are overdue, come to him freed from any equities to be set up by the maker against them.

The bank received these warrants in the course of its business, having paid a valuable consideration for them. This it had a right to do. At the time of the issue of these warrants, when they were received by the bank, and when suit was brought upon them, the defendant, under the laws of the state, was a body corporate and politic, and, by its name, it could sue and be sued, plead and be impleaded, defend and be defended, in *any* court. Section 937, Gantt's Digest, provides "that each county which now exists, or which may hereafter be established, shall be a body corporate and politic." Section 938 provides that "all suits brought by or against a county shall be brought in the name of or against the county by name, and by its name it may sue and be sued, plead and be impleaded, defend and be defended." This was the law of the contract looking to the remedy at the time it was made.

On the 27th of February, 1879, the legislature of the state passed a law, the 1st section of which provides for the repeal of certain sections of the general law of the state which gave to counties their corporate character and provided that they might be sued. Section 2 is as follows: "That hereafter all persons having demands against any county shall present the same, duly

verified according to law, to the county court of such county, for allowance or rejection." * * *

The suit in this case had been brought, and was pending in the federal court, at the time this law was passed. At that time this court had obtained jurisdiction. This act was evidently passed by the legislature with the intent to take away the right of the holders of obligations issued by the several counties of the state to bring suit on them in the federal courts, although they might have this right under the constitution and laws of the United States. Can this be done? In the case of *United States* v. *Drennan* (Hempst. 320), it is held that "the jurisdiction of the federal courts is derived from the constitution and laws of the United States, and cannot be enlarged, diminished, or affected by state laws." This principle is sustained by *Livingston* v. *Jefferson* (1 Brock. 203); also by the case of *Mason* v. *Boom Company* (3 Wall. 252).

The power to contract with citizens of other states, who have a right to sue in the federal courts, or with a national bank, which has the same right, implies liability to suit by such citizens or such national bank, and no statute limitation of suability can defeat a jurisdiction given by the constitution or laws of the United States. (*Cowles* v. *Mercer County*, 7 Wall. 118.) I think it clear that the jurisdiction of the courts of the United States over controversies cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. (*Hyde et al.* v. *Stone*, 20 How. 175; *Suydam* v. *Broadnax*, 14 Pet. 67; *Union Bank* v. *Jolly's Administrator*, 18 How. 503; *Payne* v. *Hook*, 7 Wall. 425.)

Now, at the time of the passage of this law the county had made its contract; its promise to pay was out; its liability on its promise was clear; the obligation of its contract was in existence. Could the state legislature do anything to impair the obligation of this contract of the county? "No state shall pass any law impairing the obligation of contracts," is the language of the supreme law of the land (article 10, section 1, constitution of

the United States). What is the obligation of the contract? It consists in the power and efficacy of the law which applies to and imposes performance of the contract or the payment of an equivalent for non-performance. (*Ogden* v. *Saunders*, 12 Wheat. 213.)

The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. The constitution embraces those laws alike which affect its *validity, construction, discharge, and enforcement.* (*Von Hoffman* v. *Quincy*, 4 Wall. 535; *Walker* v. *Whitehead*, 16 Wall. 314; *Edwards* v. *Kearzey*, 6 Otto, 595.)

In the case of *Edwards* v. *Kearzey*, Mr. Justice SWAYNE says: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be, and falls into the class of 'those imperfect obligations,' as they are termed, which depend for their fulfillment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable." "Want of right and want of remedy are the same thing." (1 Bacon's Abridgment—title, "Actions in General," letter B.) To be in conflict with the constitution, it is not necessary that the act of the legislature should import an actual destruction of the obligation of contracts. It is sufficient that the act imports an impairment of the obligation. If by the legislative act the obligation of contracts is in any degree impaired, or, what is the same thing, if the obligation is weakened or rendered less operative, the constitution is violated, and the act is so far inoperative.

It is a proposition not debatable that the legislature of the state cannot take away the right of the plaintiff to sue in a federal court, as such right is secured by a law of congress, which, with the constitution of the United States, is the supreme law of the land. The demurrer must therefore be sustained.

JUDGMENT ACCORDINGLY.

NOTE.—See *United States* v. *Lincoln County*, *ante*, p. 184; *Foote* v. *Johnson County*, *ante*, p. 281.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

DISTRICT OF COLORADO.

THOMAS LEITENSDORFER *v.* WILLIAM L. CAMPBELL, United States Surveyor-General, and WILLIAM CRAIG.

1. The courts will not interfere with the land department of the general government by restraining the issue of patents or other evidences of title; the complainant must wait until the land department has acted, and then attack the results of such action in a proper judicial proceeding against the person who has improperly acquired the title from the government.
2. Congress confirmed, with a reduced area, an inchoate Mexican grant (12 Stats. at Large, 71), and provided that the original and derivative claimants (15 Stats. at Large, 275) should *establish their claims to the satisfaction of the register and receiver of the proper land district.* It seems that an appeal lies from the decisions of these officers to the commissioner of the general land office, the same as in ordinary cases. It was held that a bill which alleges that the land department refused to hear the complainant's appeal, and, instead thereof, had issued patents to the respondent, to the plaintiff's injury, and that the decision of the register and receiver had been procured by bribery practised by the respondent, presented a *prima facie* case for relief.
3. Rights of the derivative claimants of the Vigil and St. Vrain grant, under the act of June 21st, 1860 (12 Stats. at Large, 71), and of February 25th, 1869 (15 Stats. at Large, 275), discussed.

(*Before* DILLON and HALLETT, JJ.)

Patents for Land. — Courts will not Restrain their Issue, but will Relieve against Fraud Practised to Procure them. — Vigil and St. Vrain Grant. — Rights of Derivative Claimants.

A DEMURRER to the original bill of complaint was sustained by Mr. Justice MILLER and Judge HALLETT, at the July term, 1877, with leave to file an amended and supplemental bill. Such a bill has been filed, and the defendants severally demur to the same. It is on this demurrer that the cause is now before the court. The amended and supplemental bill is filled with redundant and irrelevant matter, but it states in substance the following facts:

1. December 9th, 1843, Manuel Armijo, governor of New Mexico, granted to Cornelio Vigil and Ceran St. Vrain certain lands (nine hundred and twenty-two square leagues — four million ninety-six thousand three hundred and forty-five acres), then in New Mexico, now in Colorado.

2. March 7th, 1844, Vigil and St. Vrain conveyed one-sixth (undivided) of the same lands to Eugene Leitensdorfer.

3. In the same year (1844) Vigil and St. Vrain conveyed other one-sixths (undivided) to Bent Donaciano, Vigil, and Armijo, making in all four interests, of one-sixth each, so conveyed.

4. December 10th, 1861, Eugene Leitensdorfer conveyed his one-sixth interest to Thomas Leitensdorfer, the complainant.

5. June 21st, 1860, congress confirmed the grant to the extent of eleven leagues for each of the claimants, Vigil and St. Vrain (ninety-seven thousand six hundred and fifty and ninety-six one-hundredths acres in all), saving the rights of those who had acquired title from them (12 Stats. at Large, 71).

6. February 25th, 1869, congress amended the act of 1860, and provided that all claimants (the original grantees and those who had title from them) should "establish their claims to the satisfaction of the register and receiver of the proper land district," etc. (15 Stats. at Large, 275).

7. That thirty-nine claims were presented to the register and

receiver under this act, and among them plaintiff's claim for sixteen thousand acres and Craig's claim for one hundred and twenty-seven thousand acres.

8. That these claims (plaintiff's and defendant Craig's) were not for the same tract, but for separate parcels of the original grant.

9. That plaintiff's claim before the register and receiver was well supported by evidence showing the conveyance to him by Vigil and St. Vrain, and occupancy and improvement of the tract by plaintiff and his grantors.

10. That defendant Craig's claim is junior to plaintiff's, and is founded on a deed from St. Vrain alone, executed long after plaintiff's deed was made; that Craig has no title whatever from Vigil, and if his deed from St. Vrain is good, the prior grants of Vigil and St. Vrain, of which plaintiff's is the first, will absorb all of the twenty-two leagues confirmed by congress, and leave nothing for Craig.

11. That, notwithstanding plaintiff's manifest right, the register and receiver illegally, fraudulently, and corruptly allowed Craig's claim to the extent of seventy-three thousand two hundred and fifty-one and fifty-five one-hundredths acres, and disallowed plaintiff's claim altogether.

12. That the consideration for the corrupt agreement between the register and receiver and Craig was a conveyance of a portion of the tract allowed to the latter to one Golden, for the use and benefit of the register and receiver.

13. That plaintiff appealed from the decision of the register and receiver (5 Stats. at Large, 107), but was defeated in having the appeal heard, by the president directing the commissioner of the general land office to issue the plat to Craig. The appeal was never heard, and the commissioner of the land office refuses to hear it.

14. That the plat has accordingly been issued to Craig. (The statute makes the plat evidence of title—15 Stats. at Large, sec. 3, p. 277.)

The plaintiff in his bill says nothing about the other deriva-

tive claimants whose claims were wholly or partially allowed. He does not allege that any of these claimants obtained more or less than they were entitled to. He does state in his bill that the "questions arising in this action are of great and general interest to all of said derivative claimants," and that it is inconvenient or impossible to bring them all before this court.

No relief is sought in the bill against the other derivative claimants; the only defendants to the bill are Craig and Campbell, the surveyor-general of Colorado.

The prayer of the bill is that the approved plats of the derivative claim of Craig, signed by defendant Campbell, May 26th, 1877, be decreed void from the beginning and cancelled, or that Craig be decreed to hold the land in trust for the plaintiff and the other derivative claimants, and for all other general and special relief applicable to the case.

J. O. Shackelford, *R. H. Bradford*, and *John Q. A. King*, for the complainant.

G. G. Symes, for the defendants.

DILLON, *Circuit Judge*, with the concurrence of HALLETT, J., in disposing of the demurrers to the amended and supplemental bill, in substance said:

In sustaining the demurrer of the defendant Craig to the original bill, Mr. Justice MILLER distinctly and expressly held that the complainant had no right, and could have none, to restrain the issue of "approved plats," which are made "evidence of title," and that in no event could he have any relief in this court against the defendant Craig until such plats were actually issued and delivered to him. Since that time such plats have been issued and delivered; and the amended and supplemental bill (to which the present demurrer relates) differs mainly from the original bill in that it avers this fact, and also that the supreme court of the District of Columbia has refused to issue a writ of *mandamus*, at the relation of the complainant, to the commissioner of the general land office, to compel that officer to

hear the appeal taken by the complainant from the action of the register and receiver in allowing the claim of the defendant Craig, and in wholly rejecting the claim of the complainant.

As at present advised, we should be of the opinion that the complainant had the right to appeal from the decision of the register and receiver in rejecting his claim, and also from their decision establishing the claim of Craig, so far as the latter would interfere with the rights of the complainant as they might finally be established. But his appeal, and that of the other derivative claimants who appealed, were never heard by the commissioner of the general land office, or by the secretary of the interior, in consequence of the action of the president, based upon what we are inclined to regard as the erroneous opinion of the attorney-general, of May 15th, 1876, that the decision of the register and receiver was final in such a sense that no appeal would lie therefrom to the commissioner of the land office, and that the secretary of the interior had no jurisdiction to review the decision of the register and receiver.

Without any hearing or decision of the pending appeals, "approved plats" (equivalent, in legal effect, to an ordinary patent as evidence of title) have, nevertheless, been issued to the defendant. While these approved plats remain in force, it is out of the power of the commissioner of the land office or the secretary of the interior to hear and determine the appeals, for if they should decide for the plaintiff, and also decide against the defendant, these decisions would be without any legal value or effect, since the title has, as respects the land awarded and platted to Craig, passed from the government to him. With the delivery of these plats to Craig, the legal title to the land described in them passed to him, and with it passed all control of the executive department over the title. (*Moore* v. *Robbins*, 96 U. S. 530.) For this reason, the commissioner of the land office refuses, as alleged, to hear the appeal, or to take any further action in the matter, thereby remitting the complainant to the courts for redress or relief.

Although the specific land claimed by the plaintiff does not

conflict on the ground with that awarded to Craig, since the tracts are many miles apart, yet, on the facts as stated in the bill of complaint, the issue of "approved plats" to Craig does injure the plaintiff, assuming that he is entitled, or shall be found entitled, to the sixteen thousand acres claimed by him. The reason is this: All of the derivative claimants can have no more, in the aggregate, than the ninety-seven thousand six hundred and fifty and ninety-six one-hundredths acres confirmed by the act of 1860. The register and receiver rejected the claims of the plaintiff and twenty-two others, amounting to eighty-five thousand nine hundred and thirty-nine and thirty-two one-hundredths acres. They allowed thirteen claims; and to these successful claimants, including Craig, they awarded ninety-seven thousand six hundred and fourteen and fifty-three one-hundreths acres — substantially all the amount confirmed. To Craig was given seventy-three thousand two hundred and fifty-one and fifty-five one-hundredths acres. If Craig's plats of the title stand, and particularly if plats are delivered to the other successful claimants — if this has not already been done — then, if the plaintiff should hereafter be found entitled to his land, he cannot get it, for the grant, as confirmed, is already exhausted.

Under the act of June 21st, 1860, as amended February 25th, 1869, the validity and extent of the claims of Vigil and St. Vrain, and all of the derivative claimants, were matters which it was contemplated and provided should be decided by the executive instead of the judicial department of the government. (*United States* v. *Flint*, 4 Sawyer, 42; *Foster* v. *Neilson*, 2 Pet. 314.) This view finds support in the consideration that the execution of treaty provisions is for the political, and not the judicial, branch of the government, unless otherwise expressly provided, and in the further consideration that the above-mentioned acts of 1860 and 1869 prescribe no rules by which the conflicting rights and equities of the derivative claimants shall be settled; and as there is not, or may not be, enough land (in consequence of the great reduction in the confirmation of the grant) to satisfy the claims of all, it must have been contemplated that

their several rights and equities should be determined by the merits of their respective claims, including the extent of actual occupation and value of improvements as primary elements, rather than the mere date of the grants or promises to settle made by Vigil and St. Vrain, under the assumption that they owned nine hundred and twenty-two square leagues, instead of twenty-two square leagues, as diminished by the act of June 21st, 1860.

The amount of land claimed by all the derivative claimants greatly exceeded the whole area confirmed. There is not enough for all, and the reasonable inference would seem to be that congress intended to place *bona fide* derivative claimants having actual settlements upon an equal footing, irrespective of the date of their several titles or promises to settle, and that the extent to which they should severally be entitled to receive lands (not exceeding, in the aggregate, the amount of the confirmed area) should be decided by the land department of the government. Such decision must, in the very nature of the peculiar circumstances of the case, rest upon special facts and equities appertaining to the several claimants, which the executive branch of the government could as well determine as any one else, and not upon pure or strict principles of law, which could be more appropriately determined by the judicial than by the executive department.

If this is a sound conclusion, it results that the rights of the claimants must be determined by the executive department, and not by the courts; and that the courts can only interfere, if at all, in the results of executive action when such results have been procured by fraud and corruption, or, possibly, by a denial of some plain legal right.

It is alleged in the bill that Craig corruptly influenced the decision of the register and receiver in his favor by conveying to a third person, for their use and benefit, twenty-two thousand five hundred acres of the land embraced in their decision. If this is true, a decision thus procured cannot be the basis of any rights which can injuriously affect the plaintiff; and approved

plats of title to land upon such a decision have no validity as respects any person injured thereby, and who seeks to avoid them by judicial action.

Mr. Justice MILLER decided, at the last July term, that, although such fraud and corruption were practised, it did not warrant the courts in interfering with the action of the officers of the executive department by restraining the delivery of plats, and that the plaintiff must wait for relief until the plats were delivered and the executive department had exhausted its power and its right to act.

Although the point, in view of the anomalous and peculiar nature of the case, is by no means free from doubt, our present opinion (subject to review hereafter) is, that it is not a necessary or fair deduction, from what was then decided, that the courts cannot set aside such plats if it shall be judicially established that they were based upon a decision of the register and receiver procured by fraud and corruption — and this, although this court may not have the power to make any decree or order which the officers at the land department will be bound to obey or respect, and although we may not have the right to withdraw the controversy, on its merits, as between the plaintiff and the defendant, or between all the derivative claimants, from the arena of the executive department into the arena of the courts. The supreme court of the United States, while firmly holding to the principle that the courts could not interfere with and control the officers of the land department in the exercise of their duties, has frequently decided that the courts could correct the result of such action whenever it invaded private rights. This is declared with great emphasis in *Johnson* v. *Towsley* (13 Wall. 84). It was reaffirmed at the last term, in *Moore* v. *Robbins* (96 U. S. 530), and is thus stated by Mr. Justice MILLER: "The decision of the officers of the land department, made within the scope of their authority, on questions of this kind, is in general conclusive everywhere, except when reconsidered by way of appeal within that department; and that, as to the facts on which their decision is based, in the absence of fraud or mis-

take, that decision is conclusive, even in courts of justice, when the title afterward comes in question; but that in this class of cases, as in all others, there exists in the courts of equity the jurisdiction to correct mistakes, to relieve against frauds and impositions, and, in cases where it is clear that those officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief."

In the recent case of *Shepley* v. *Cowan* (91 U. S. 340), the doctrine is thus aptly stated by Mr. Justice FIELD: "The officers of the land department are specially designated by law to receive, consider, and pass upon proofs presented with reference to settlements upon the public lands, with a view to secure the right of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions; but, for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the department."

If the alleged bribery is established, and if the approved plats are set aside, and we can go no further, the executive department will again be free to act, and to hear and decide the appeals; and its officers may, perhaps, by *mandamus* from the proper tribunal, be compelled to act on the appeal, although their judgment cannot be judicially controlled.

We concur in holding that the bill, as amended, may be sustained, on the ground that it is alleged that the decision of the register and receiver was procured by the defendant by fraud, that the title of the defendant rests on that decision, and that, in consequence of it and the issue of the plats, the executive department has disabled itself from hearing the appeals and discharging the duties imposed on it by law. The demurrer admits the facts stated in the bill, and if we should hold differently, the plaintiff would be remediless, and justice might fail.

The case, in many of its aspects, is wholly without a precedent, and on some of the points involved we have had, and still have, grave doubts, and our judgment in relation to them is by no means irreversibly settled. When the proofs come in, we shall be willing to hear further arguments concerning any of the views presented, and as to the extent to which, if at all, the plaintiff will be entitled to relief if the alleged bribery and corruption shall be proved.

If such bribery be established, it will then become a question whether we shall wholly set aside the plats, so as to remove the obstacles to executive action, or whether, having taken jurisdiction for one purpose, we can proceed to give complete relief, and to that end set aside the plats only so far as may be necessary to secure the plaintiff the land to which he may show himself entitled. This may depend as well upon the frame of the bill as upon the power of the court.

The defendant Campbell is improperly made a defendant, and his demurrer is sustained. The demurrer of the defendant Craig is overruled, with leave to answer.

HALLETT, J., concurs.

ORDERED ACCORDINGLY.

ASHER A. WHITE, administrator of Simon White, deceased, *v.* COLORADO CENTRAL RAILROAD COMPANY.

1. A railroad company which keeps a warehouse for storing goods carried over its line until they shall be called for by the consignee, in respect to goods so carried and stored in its warehouse is regarded as a bailee for hire, and is required to exercise the care and diligence of ordinary warehousemen in keeping such goods.
2. Putting a large quantity of powder (one hundred and sixty kegs) in the same warehouse with plaintiff's goods was negligent conduct, for which defendant is liable in damages to the extent of the loss resulting to plaintiff from the presence of such powder in the warehouse.
3. A fire occurring in defendant's warehouse, where plaintiff's goods were stored, there being a large quantity of powder in the same house,

if the firemen who resorted to the place for the purpose of extinguishing the fire were, by the presence of powder in the house, hindered and prevented from saving plaintiff's goods, the powder may be regarded as the proximate cause of the loss.

4. In such case the question of negligence is not for the jury, and the jury may be instructed that the storing of powder in the same house with plaintiff's goods, such house being located in a city where there was danger from fire, is negligent conduct on the part of the defendant.

(*Before* HALLETT, J.)

Liability of Warehousemen.—Negligence.—Explosive Substances.

THIS cause was tried before HALLETT, J., and a jury. A verdict for the defendant was returned. The following opinion was delivered on the plaintiff's motion for a new trial.

Messrs. Charles and *Dillon*, for the plaintiff.

Messrs. Teller and *De France*, for the defendant.

HALLETT, J.—On the 1st of January last, plaintiff's intestate shipped a lot of dry goods and clothing from Georgetown to Denver over defendant's line. The goods were received at Denver and placed in defendant's warehouse on the morning of the 3d of the same month. Two days later they were destroyed by fire which originated in the building without fault of defendant. This action, in which plaintiff seeks to recover the value of the goods so destroyed, is founded upon an alleged liability of defendant to plaintiff as a common carrier and as a warehouseman.

As to the first count in the declaration, in which plaintiff sought to charge defendant as a common carrier, the jury have found against the plaintiff, and thus all questions arising on that count have been eliminated from the case. On the second count, in which defendant is charged with negligence as a warehouseman, the jury found for plaintiff in the sum of $4,704.75, and the motion now to be considered is directed against that verdict.

It seems from the evidence that defendant's warehouse was a long wooden structure—one hundred feet or more in length—

and that the company's offices for transacting its freight business were kept in one end of it. These offices were divided off from the main building by partitions, and the remainder of the building was used for storing goods. At about the center of the building, on each side, and communicating with the part which was used for storage, were large doors, through which the goods were passed when received into or taken out of the building. The plaintiff's goods, when received, were put in that end of the building which did not contain the office, and, of course, at some distance from the doors last mentioned.

By the same train which brought plaintiff's goods, a quantity of gunpowder, amounting to about one hundred and sixty kegs, was also received; and this powder was put by defendant in the same room with plaintiff's goods, but upon the other side of the doors before mentioned, and towards the offices, which were in that end of the building. So that, with reference to the doors which opened through the warehouse, it may be correct to say that the offices and the powder were in one end of the building, while the plaintiff's goods were in the other end of the same building. But the powder was, in fact, pretty near the door on that side where it lay, and between the offices and the plaintiff's goods.

The fire which destroyed the building and the goods, when first discovered, was in the roof immediately above the offices, and, of course, at some distance from the plaintiff's goods. Thus it appears that the fire was in one end of the building and the plaintiff's goods in the other, while the powder was between the fire and the goods, on the same side of the large doors before mentioned as the fire. This was the situation when members of the fire department arrived in considerable force on the ground with their apparatus, for the purpose of extinguishing the fire. The weather was cold, and some delay occurred before water was obtained, but three or four streams were soon brought to bear, so that, under ordinary circumstances, the flames might have been suppressed before half the building was destroyed. One witness testifies that there was an opportunity to cut off the fire at the

large doors before mentioned, by carrying the water in at that place and playing on the fire from the inside.

But nothing of this kind was attempted, and, indeed, the firemen would not go within seventy or eighty feet of the building on the outside, because they feared injury from the powder. Some testimony was given at the trial to show that this fear was unfounded, but if the experts who testified on that point had been present at the fire to explain the properties of gunpowder to the terrified firemen, it is doubtful whether the explanation would have been entirely satisfactory. The theory advanced is that metallic cans, in which the powder was put, are so expanded and cracked by the heat of a burning building that the powder escapes, and in that condition, if ignited, it produces only a flash in the pan, which is not at all dangerous to those who are outside of the building. If, however, one who is inside the building swallows the fire, as one of the witnesses said, it is deadly; so that even on this theory it was not safe to go into the building at the large doors before mentioned, for the purpose of suppressing the fire. So, too, a prudent person might well be excused from assuming that all of the cans would be cracked and laid open by the heat so as to render them harmless. Altogether, it may be said that this evidence does not prove, nor tend to prove, that the powder was not dangerous to life in the situation where it was found, but merely that the workmen might have approached the building more closely without danger to themselves. Whether they could have worked more effectively at a distance from the building of twenty-five or thirty feet than at a distance of eighty feet, does not appear, but may be a matter of reasonable inference. It does, however, appear that the gunpowder prevented the firemen from going in at the large doors before mentioned, with hose, and there operating against the fire. All the witnesses agree that this movement would, under the circumstances, have been full of danger, and it seems probable that it was not made for that reason. One witness testifies that he suggested it to the firemen, and was answered that it was dangerous to go there on

account of the powder. Looking to the form of the building, the fact that it was built of wood, and the situation of plaintiff's goods with reference to the fire, it also seems probable that the goods would have been saved if the powder had not been stored in the building. Upon the evidence showing or tending to show that the loss of the goods was due to the presence of the powder in the warehouse, the court charged the jury as follows:

"As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored there. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was certainly occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods, and would have done so, if no powder had been kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witness said about it, you determine as well as you can whether this loss certainly proceeded from that cause—from the presence of the powder. If it is doubtful in your mind, upon the evidence here, whether the loss was occasioned by that, that is to say, if, withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to me from the evidence here, was the putting of the powder there, and you must be able to ascribe that loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which the matter stands."

That this principle is applicable to ordinary warehousemen, would appear to be beyond question. To store or deposit gunpowder in large quantities in any place in a city where it will

endanger life and property, is a public nuisance. (*Cheatham* v. *Shearon*, 1 Swan, 213; *Myers* v. *Malcolm*, 6 Hill, 292.)

The case in 6 Hill shows that the party storing the powder will be liable for any damage that may result from it. And the same view is expressed in some of the text-books. (1 Addison on Torts, 308; Wood on Nuisances, sec. 142.)

Warehouses are usually, if not always, located in cities, where the danger from fire is great, and, of course, keepers of such houses must provide against the danger with reasonable care. It is often difficult to determine whether such care has been used, but no embarrassment is felt respecting the point now under consideration. With reference to warehousemen in general, we have only to ask whether a prudent man would store a large quantity of gunpowder in a building with other goods, in a populous city—whether that is the usual and ordinary course of business—to decide the question of negligence.

But it is said that a railway company which keeps warehouses for the convenience of the public, and as a necessary appendage to the business of a carrier, is not to be put upon the footing of ordinary warehousemen; that the company is not a warehouseman by choice, but through the negligence of its patrons, who will not take away their goods as soon as they are received at the company's depot; that as the company may lawfully carry all things, so may it lawfully store whatever it carries, and he who entrusts goods to its charge takes upon himself the risk of such storage. These suggestions are not without weight, but it is believed that they ought not to prevail against the general rule which exacts from a bailee for hire reasonable diligence in the care of property entrusted to him. That a railway company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded as a bailee for hire, and not as a naked depository, is now fully settled. (*Norway Plains Co.* v. *Boston and Maine Railroad*, 1 Gray, 273; Wharton on Negligence, sec. 478.)

As such, no reason is seen for relieving it from the duties and responsibilities which attach to that character of bailment. It

must be borne in mind that the company was not bound to carry the powder on its railway, and still less was it required to store so dangerous an article in its warehouse. (*Boston and Albany Railroad Co.* v. *Shanly*, 107 Mass. 575; Wharton on Negligence, sec. 856.)

If the company was willing to incur the risk of carrying powder, it must be assumed that it was also willing to take upon itself the liabilities incident to such risk. So, also, it may be said the matter of storing the powder was disconnected from and entirely independent of the carrying. Although the company had carried the powder, it was not bound to put it in its warehouse. The consignee might have been required to take away the powder in the very hour of its arrival at Denver, or it might have been sent to some warehouse prepared and kept for storing such articles. Putting it in the warehouse of the company was a voluntary act, carrying danger to the property of others, and therefore wrongful in itself. That it was not an exercise of the reasonable care in preserving the plaintiff's property which the law enjoined, seems to be too plain for argument.

Another objection to the charge is that the powder, if at all instrumental in the destruction of plaintiff's goods, was not the proximate cause of that result. To support this objection, insurance cases are cited in which it has been held that loss occasioned by explosion of powder may be connected with the fire which ignited the powder as the proximate cause.

Hence, it is claimed that, in all such cases, the fire, and not the powder, is the proximate cause of loss. But there may be, and usually there is, more than one agency or means of producing loss. Take, for instance, the car loaded with oil which escaped from the company's servant and ran down a steep grade and came in collision with a locomotive, which set fire to the oil, and thence it was communicated to the plaintiff's house. The fire and oil united in the destruction of plaintiff's house, and the cause of all the mischief was a defective brake on the car. If there was negligence in respect to any one of these things, the person chargeable with such negligence was responsible for the loss. (*Oil Creek and Allegheny Railway Co.* v. *Keighron*, 74 Pa. St. 316.)

So, also, where dry grass was negligently allowed to remain in heaps near defendant's railway, and fire was communicated to such heaps by a passing engine, and thence carried by the wind a distance of two hundred yards to plaintiff's cottage, which was destroyed, the defendant was held liable. (*Smith* v. *London and Southwestern Railway Co.* Law Rep. 6 C. P. 14, s. c. Law Rep. 5 C. P. 98.) The fire was, of course, a cause of mischief, but the wind and dry grass were also efficient in communicating the fire to the building, and the negligence was in respect to the grass only. If defendant had set the grass on fire negligently, or (if that had been possible) had caused the wind to blow, it would have been liable for the loss in the same manner.

On the same principle, it was held in Massachusetts that one who negligently cut the hose with which water was supplied for suppressing a fire, was liable for the damage occasioned by his wrongful act. (*Metallic Compression Casting Co.* v. *Fitchburg Railroad Co.* 109 Mass. 278.)

There, as in the case at bar, it was contended that the proximate cause of loss was the fire, rather than the act of the defendant. But the court was of a different opinion; saying that when a man cuts off the hose "through which firemen are throwing a stream on a burning building, and thereupon the building is consumed for the want of water to extinguish it," his act is to be regarded as the direct and efficient cause of the injury.

In all these cases it may be said that the fire is a proximate cause of loss, but it does not follow that it is the only cause standing in that relation to the result. And so, while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." (Sherman and Redfield on Negligence, sec. 10.)

Without further discussion of what appears to be plain, we have no doubt the powder was near enough to the loss to make the defendant liable for its negligence in putting it in the ware-

house, if, as the jury have found, it directly contributed to the result; and this objection must be overruled.

The defendant further relies on the form of the instruction, claiming that the question of negligence was improperly withdrawn from the jury.

It is not denied, and it cannot be successfully claimed, that where the facts are established, negligence may be an inference of the law to be decided by the courts. (Sherman and Redfield on Negligence, sec. 11; *Tarwater* v. *Hannibal and St. Joseph Railroad Co.* 42 Mo. 193; *Pittsburg and Connellsville Railroad Co.* v. *McClurg*, 56 Pa. St. 294.) In some cases, as where the conclusion to be drawn is not direct and certain, the rule is otherwise (17 Wall. 663); but here the facts lead in but one direction.

It was admitted at the trial that defendant's warehouse was in the city of Denver, and whether powder was stored there—although it was not denied—was submitted to the jury on the evidence. It is difficult to discover any other fact that entered into the question of negligence, unless it be the dangerous properties of powder, and perhaps that is the point in controversy.

In the argument of this motion at the bar, counsel were understood as saying that the testimony of witnesses at the trial had raised a doubt as to the effect of powder exploding in a burning building, and if the question to be decided should be as to the effect of such explosion on the building itself and the contents thereof, their position would not be untenable. The testimony tended to prove that neither the building nor the goods therein were much injured by the explosions. But this is not the point to which the evidence was directed. As before explained, the question was whether the firemen were reasonably deterred by the presence of powder in the building from effective work in extinguishing the fire. And so far was the evidence from showing or tending to show that the firemen were not so deterred, that it tended rather to establish the inference of danger to life from the presence of that article, at least as to all those who should attempt to enter the building. So that the evidence referred to did not in any way affect the question of negligence, and if it bore on the other point, as to whether the firemen were

in fact hindered from operating against the fire, that matter was submitted to the decision of the jury on the evidence.

Aside from this, I cannot believe that it is in any case necessary or proper to ask a jury to find whether gunpowder is a dangerous compound. The fact is of universal notoriety, familiar to all men, and needs neither finding nor proof to establish it. What would be thought of the demand for such proof in a prosecution for assault with attempt to kill and murder? Would it be said that the government must show that the gun was loaded with powder and ball, and that powder is an explosive substance capable of expelling the ball from the gun with great force, and so on.

Generally, as to the negligence imputed to defendant, it may be said that the act was not to be affected by the circumstances attending it, and therefore it was not to be decided by the jury. If under any circumstances the storing of powder with other goods in a warehouse in a city would be a reasonable exercise of judgment and discretion, the rule would be otherwise; because, if the circumstances may give color to the act, and make that fair and unquestionable which otherwise must appear to be culpable, the jury would have to determine whether by the circumstances the act was relieved of the character ascribed to it. But such, it is believed, cannot be the rule as to any such misconduct. There was nothing in the evidence upon which the jury could say that the act of putting powder in the warehouse was not negligence, and therefore there was nothing to be determined by them on that point, except the matter of putting it there, which was left to them to decide on the evidence.

Whether the presence of the powder in the warehouse was the direct and efficient cause of the loss, was not, as it could not be, conclusively shown; but the evidence on that point is regarded as sufficient to sustain the verdict. That was peculiarly a question for the jury. (*Milwaukee Railway Co.* v. *Kellogg*, 4 Otto, 474.) We do not feel at liberty to disturb the verdict on that ground; and we have not been able to discover any error in any part of the record. The motion is denied.

MOTION DENIED.

F. P. ERNEST *v.* J. R. STOLLER and S. R. HILL, partners, etc.

Factors at Kansas City were instructed by their principal to place the proceeds of a sale of property to the credit of the principal in the Exchange Bank, in Denver. The factors deposited the money in a bank at Kansas City, to the credit of the Exchange Bank. The Kansas City bank failed in two days thereafter. In an action by the principal against the factors, *Held*, on the facts appearing in the case, that it was the defendants' duty to have put the money in the Exchange Bank, or to have adopted the usual and ordinary means to effect that end; and having failed to do either, and to show affirmatively that such failure was not the cause of the loss, the defendants were liable.

(*Before* HALLETT, J.)

Factor's Duty to Obey Instructions in respect of Transmitting Funds to Principal.—Usage.

THE cause was tried before the court. The facts appear in the opinion.

Mr. Butler, for the plaintiff.

Mr. Hughes, for the defendants.

HALLETT, J.—Defendants are engaged in the business of selling live stock at Kansas City, in the state of Missouri.

In July last, plaintiff consigned to them, from Deer Trail, in this state, ten car-loads of cattle, to be sold for his account. The cattle arrived at Kansas City on the 26th day of July, and were immediately forwarded to Brown, Price & Co., of Chicago, who sold them and remitted the proceeds to defendants, at Kansas City, by draft on New York. This draft, amounting to $3,771.65, was received by defendants at Kansas City in the morning of the 1st day of August, and was by them deposited to their own credit in the Mastin Bank, at that place. Deducting a small sum due them for charges on the cattle, defendants at the same time drew a check on the bank for the sum due to plaintiff, as the net return from the sale of the cattle, and took in exchange for the check a deposit slip in the following form:

"THE MASTIN BANK,
"KANSAS CITY, MO., 7–31, 1878.

"*Exchange Bank, Denver, Col.:*

"Your account has credit thirty-seven hundred and fifty-seven 56-100 dollars, deposited by Stoller & Hill, for use of F. P. Ernest.

"Very respectfully,

"JOHN J. MASTIN, *Cashier.*

"*$3,757 56-100.* Per J. A. BOARMAN, *Teller.*"

This certificate was issued in duplicate and one copy delivered to defendants, and by them sent by mail to plaintiff, at Deer Trail, where it was received on the 3d day of August. According to the course of business, as claimed by defendants, the Mastin Bank should have sent the other copy by the next mail to the Exchange Bank, of Denver; but this apparently was omitted, as the officers of the latter bank testified that they did not receive it until some time after the Mastin Bank suspended, and then notice of the credit was sent by the receiver of the bank.

The date as given in the certificate—July 31st—is shown to be incorrect. It was issued on the 1st day of August, and the credit was not entered on the books of the bank until the next day. On the 3d day of August, 1878, the Mastin Bank was not opened for business, and from thence hitherto it has been wholly insolvent, so that the sum so deposited by defendants has not been received by the Exchange Bank or by the plaintiff. It is claimed by defendants that the money was deposited in the Mastin Bank in compliance with instructions from plaintiff to place the amount to his credit in the Exchange Bank, of Denver.

As to the instructions given relating to the proceeds of the sale, and all the facts hereinbefore mentioned, there is no controversy.

At an interview between the plaintiff and defendant Stoller, which took place at Kansas City about the time the cattle arrived at that place, defendants were directed to place the money received from the cattle to plaintiff's credit in the Exchange Bank, of Denver. Both parties agree in this statement, and also in saying that no directions were asked or given as to

the manner of transmitting the money to the Exchange Bank. Considered in itself, the instruction given by plaintiff to defendants imports nothing more than the substitution of the Exchange Bank, of Denver, for himself, as the party to whom the money was to be sent. But defendants contend that it has a peculiar significance when taken in connection with a custom or usage universally recognized by cattle dealers at Kansas City, and well known to all persons dealing with them, by which money is remitted to banks in other places in the way and manner adopted by defendants in this instance. By this usage, the factor is required to deposit in some bank in Kansas City the proceeds of any consignment that may be made to him to the credit of the bank to which the remittance is to be made, and to forward to his customers one of the slips issued by the bank at Kansas City, attesting such deposit. With that, it is said his duty ends, and if any loss occurs, it must fall on the principal rather than the agent. From the evidence given at the trial, it seems that the usage is not recognized by all the dealers at the Kansas City stock-yards, but perhaps it is sufficiently shown that the course pursued by defendants was recognized among such dealers at that place as a method of transmitting money to distant places. Four out of thirteen or fifteen firms engaged in that business at the stock-yards near Kansas City were in the habit of remitting money in that way, and the officers of the First National Bank, formerly in business there, and of the Mastin Bank, testify that the practice was general.

The direction to defendants to place the money to plaintiff's credit in the Exchange Bank, of Denver, required them to transmit the money to the bank in some usual and customary method, recognized among business men as proper for that purpose; and if there are several methods of transmitting money from Kansas City to Denver equally in use among business men, and safe, serviceable, and economical, no reason is perceived for saying that defendants were bound to adopt one such method more than another. From what we know of business in the country at large, although no evidence was given on that

point, we may assume that if the money had been sent by express, or by bill of exchange on New York, the risk of loss *in transitu* would have been with the plaintiff. Choosing fairly between known and recognized methods of sending the money as directed by plaintiff, defendants would not be held responsible for an error in judgment, or for any misfortune to which they had not contributed. (Wharton's Agency, sec. 248; *Chandler* v. *Hogle*, 58 Ill. 46.) And so we may say that if the method adopted by defendants for transmitting the money to the Exchange Bank was in use among business men in Kansas City and Denver, they cannot be chargeable with negligence or omission of duty to their principal in resorting to it.

But when we consider attentively the nature of the alleged usage, we find that it is not shown to be of sufficient extent to embrace the subject of this controversy. It is said to be a method of transmitting money from one city to another, but it cannot be such unless it extends to the place to which the money is to be sent, as well as that from which it started. It must be a usage between the bankers in Kansas City and the bankers in Denver, or between the Mastin Bank and the Exchange Bank, of Denver, to be effectual in any way. According to the alleged usage, the effective act in transferring the funds from Kansas City to Denver was to be performed by the Denver bank; money was deposited in Kansas City to the credit of the Denver bank, and, of course, it would remain there until the bank should draw for it, or get it in some other way. In other words, defendants were instructed to send the money to the Exchange Bank, of Denver, and, instead of complying with that instruction, they placed it in the Mastin Bank, at Kansas City, and invited the former to come to Kansas City and get it, or send for it, as would best suit its convenience. If, by force of some general usage between the banks named, or between the banks in Kansas City and the banks in Denver, or by some special agreement, authority had been conferred on the Mastin Bank to receive deposits for the Exchange Bank, the position assumed by defendants would be more tenable. But nothing of that kind

was shown. The Exchange Bank did not keep an account with the Mastin Bank at the time of this transaction, and the alleged usage was not shown to exist, except in Kansas City. Whatever the custom of banks and dealers in that city may be in matters of this kind, it could not confer the authority here claimed for it. The Exchange Bank was not in any way bound to recognize the deposit-made by defendants in the Mastin Bank for its use, or to take any action in respect to it. For the purpose of transmitting the money, the defendants could have notified the Exchange Bank that they held it subject to order, and the act would have been just as effective. That the money was not sent, or anything that could symbolize it, is too plain for argument.

The language of the deposit slip is, "Your account has credit," which means no more than we hold for your use, or, we have a sum of money, and you can get it whenever you may apply for it. Until the Denver bank should agree to such holding in some form, or should send for the money by draft, or otherwise, no transfer of the fund would take place. And whether this would have been done by the Denver bank at any time if the Mastin Bank had continued in business, is matter for conjecture only. They were not bound to act, and we cannot assume that they would have taken any steps to get the money. That is not, however, of any importance in this connection; it is only necessary to say that defendants were instructed to send the money to the Exchange Bank, and they have not done it.

That they acted in good faith, upon the assumption that the Exchange Bank would accept the credit in the Mastin Bank, and that the course pursued by them was sanctioned by commercial usage at Kansas City, will not help them. They should have put the money into the Exchange Bank, or adopted the usual and ordinary means to effect that end; and having failed to do either, and to show affirmatively that such failure was not the cause of the loss, they must be held for the amount.

The judgment will be for the plaintiff.

DILLON, J., concurs. JUDGMENT ACCORDINGLY.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

DISTRICT OF NEBRASKA.

AUGUSTUS KOUNTZE *v.* CITY OF OMAHA.

1. As to the liability of lands within the limits of a municipal corporation to be taxed for municipal purposes, this court will follow the latest decision of the supreme court of the state on the point.
2. No judicial inquiry is permissible into the motives of the legislators in the enactment of a particular statute.

(*Before* DILLON, *Circuit Judge.*)

Municipal Taxation of Real Property. — State Court Judgments as Rules of Decision in the Federal Court.

THIS is a bill to restrain the sale of lands belonging to the plaintiff for taxes levied thereon by the city of Omaha for municipal purposes. The gravamen of the bill is that these lands were brought within the limits and jurisdiction of the city by an act of the legislature, which was passed for the sole purpose of imposing the burdens of the expenses of the city government and of the city debt upon the plaintiff, as owner of the lands, when, in point of fact, they were not in a situation nor of a character to be so dealt with and burdened. The proofs bring them within the description of lands exempted from municipal

taxation in *Bradshaw* v. *Omaha* (1 Neb. 17), and of *Oliver* v. *Omaha*, decided in this court by Mr. Justice MILLER (3 Dillon, 368). *But very recently the supreme court of Nebraska* has held that such lands are taxable. (*Turner* v. *Althaus*, 6 Neb. 64.) This decision has been made while this suit was pending. At the end of the opinion, however, it is said that it is not intended to apply to cases where "it clearly appears that the sole object of a legislative act extending the power of taxation by a city over a community on lands beyond its original limits is to increase its revenues only, and not for the purpose of any municipal regulations or government over the same."

Mr. Woolworth, for the plaintiff.

Mr. Thurston, for the defendant.

DILLON, *Circuit Judge.*—In the recent case of *Turner* v. *Althaus* (6 Neb. 64), the supreme court of the state has overruled the case of *Bradshaw* v. *Omaha* (1 Neb. 17). While the latter decision remained, this court considered it as establishing a rule of decision which it was its duty to follow. (*Oliver* v. *Omaha*, 3 Dillon, 368.) It is equally our duty to follow the rule laid down in the recent case. The same property cannot be held taxable by the one court, and not by the other.

It is inadmissible to institute a judicial inquiry into the intention or motives of legislators in the enactment of a statute, and to make the validity of the enactment depend upon the result of such an examination.

The bill must be dismissed; but, under the circumstances, no costs will be allowed to either party.

BILL DISMISSED.

FRED. A. STOUTZ *v.* JAMES E. BROWN and JOHN FINLEY.

School lands held by the state of Alabama under the act of congress of June 22d, 1854 (10 Stats. at Large, 299), situate within the state of Nebraska, are not taxable by the authority of the latter state.

(*Before* DILLON, *Circuit Judge.*)

Alabama School Lands in Nebraska not Taxable. — Relief against Illegal Taxation.

THIS suit is brought to quiet title and to remove a cloud created by certain taxes and tax-deeds upon a portion of the lands lying in Otoe county, Nebraska, which are known as the "Alabama school lands."

By act of congress of June 22d, 1854, certain school districts in the state of Alabama were allowed to select from the government lands certain tracts in lieu of sections 16 and 36 in a certain district of Alabama, otherwise disposed of by the government. In accordance with said act, certain lands in Nebraska were so selected. In February, 1870, the state of Alabama conveyed said lands to one George F. Harrington, through whom complainant derives his title.

The defendants originally claimed *title* under sundry tax-deeds; but having withdrawn their claim of *title*, they now rely upon their tax receipts, tax certificates, and tax-deeds as evidence of their right to be treated as assignees of the amount of the taxes levied and paid on the property and subrogated to the rights of the state and county in this regard.

The taxes claimed by the defendants are of two classes: *1st.* Those levied between 1860 and 1870. *2d.* Those levied after 1870.

The plaintiff offers to pay the defendants the amounts paid out by them for taxes levied *after* 1870, and twelve per cent interest from date of payment and costs of suit.

As to the taxes *prior* to 1870, the plaintiff claims that the lands were not taxable by the state of Nebraska, because they were the

property of the state of Alabama, and formed part of the school lands and fund of that state. On the other hand, the defendants insist that the state of Alabama cannot legally take, hold, or transfer realty within the limits of Nebraska, but if it can, they further insist that the lands are taxable in the same manner as if owned by private individuals.

Issues have been made up, the proofs taken, and the cause is now on final hearing.

G. W. Covell and *S. H. Calhoun*, for the plaintiff.

E. F. Warren and *J. L. Mitchell*, for the defendants.

DILLON, *Circuit Judge.*—Congress, in providing for the admission of Alabama into the Union, in 1819, made the usual grant of the 16th section, or, if sold or disposed of, then other lands equivalent thereto and most contiguous to the same, for the use of schools (3 Stats. at Large, 400, sec. 6). In 1836 (5 Stats. at Large, 116), provision was made by congress for carrying into effect in that state the existing compacts in regard to schools. In 1845, this last-named act was amended (5 Stats. at Large, 727). On June 22d, 1854, the state having lost the benefit of certain of the school lands by reason of a different disposition thereof by treaty with certain Indian tribes, congress passed an indemnity act authorizing the state authorities of Alabama "to select, by legal subdivisions, from *any* of the surveyed public lands," the requisite quantity; "which selections, upon being approved by the secretary of the interior, shall be holden by the same tenure and upon the same terms, for the support of schools in such townships, as the sections numbered sixteen would have been had not treaty stipulation made other disposition thereof." (10 Stats. at Large, 299.)

Under this act, selections were made by authority of the state in September, 1858, of lands lying in the then territory of Nebraska. These selections were approved by the secretary of the interior in December, 1859. The state of Alabama provided for the sale of these lands by an act approved February 23d,

1860, amended December 29th, 1868. The lands were sold by the state to one Harrington (under whom plaintiff derives title), October 5th, 1869, and duly conveyed to him February 24th, 1870.

After the selection and approval of these lands to the state of Alabama, viz., April 19th, 1864, congress authorized the people of Nebraska to form a constitution, with the usual provisions in respect of the public lands (13 Stats. at Large, 47), and the state was subsequently admitted into the Union.

From 1860 to 1870, the territory, and after its admission the state, of Nebraska, assessed these lands owned by the state of Alabama for taxation, the same as if they had been owned by private individuals.

The plaintiff claims that Nebraska had no authority to tax these lands while owned for school purposes by the state of Alabama. On the other hand, the defendants claim that the state of Alabama had no authority of law to hold lands within the limits of the state of Nebraska. As the title of the state of Alabama to these lands was perfect when Nebraska was a territory, and was derived immediately from congress, there is no solid ground for the defendants' claim in this respect.

It is a somewhat more difficult question whether these lands while owned by Alabama were exempt from taxation by the territorial and state authorities of Nebraska. No act of congress declares such exemption. On the other hand, no act of congress or of the territorial or state legislature has expressly declared that they were taxable.

But since these lands were granted for schools—were in lieu of those first given for this purpose—and were to be "holden by the same tenure and upon the same terms" as those originally granted, and since the title of the state of Alabama was derived immediately from congress, and became perfect during the territorial *status* of Nebraska, it seems to my mind reasonably plain that it was not intended that they should be subject to local taxation while held by Alabama for the purposes of the grant. If the lands had been in Alabama, where it was origin-

ally intended they should be, they would not, while remaining unsold, have been taxable by that state. Congress, in order to keep its compact with the state, granted, in the place of lands it had lost, other lands situate within the territory of Nebraska, but upon the same trusts. Congress was the supreme legislative power in the territory where these substituted lands were situated, and it can hardly be supposed that congress, to which we must attribute both the intention and purpose to deal justly, designed to subject these lands, or allow them to be subjected, while held by the state, to local taxation.

The special facts of this case do not involve the broad question argued by counsel as to the right of one state to own lands within another, or the further question, if a state can thus own lands, whether they are impliedly subject to the revenue laws of the state in which they are situate. Under the circumstances, these lands were held for public uses to the same extent as if they were within the state of Alabama. There is no express adjudication on the point here decided, but the analogies of the law support the conclusion we have reached. (Dillon on Municipal Corporations, sec. 614; Cooley on Taxation, 57 and 58; *Railroad Company* v. *Penniston*, 18 Wall. 30.)

All taxes, therefore, levied on these lands prior to 1870, are void.

As to those levied afterwards, the stipulations and offers of the respective parties reduce the controversy to narrow limits. The defendants, while relying on their tax certificates and tax-deeds as evidence of their rights, disclaim all title. The plaintiff offers to pay all taxes assessed after 1870, with twelve per cent interest. The defendants claim forty per cent (the statutory rate) for two years, and twelve per cent (the legal rate of interest) afterwards.

The plaintiff asks affirmative relief. The principles enunciated this term, in the cases of *Craig* v. *Pollock, infra*, apply. The lands were taxable after 1870. No illegal valuation is shown. The irregularities relied on by the defendants were harmless. The taxes were not paid. They were tendered for the year 1875.

The plaintiff may either dismiss his bill or submit to a decree to pay the amount of taxes actually paid by the defendants since 1870, with forty per cent for two years and twelve per cent thereafter, except for the year 1875, for which the rate will be twelve per cent.

ORDERED ACCORDINGLY.

CRAIG & CLARK *v.* J. W. POLLOCK; SAME *v.* CONES; SAME *v.* CAMPBELL; WALTER CRAIG *v.* POLLOCK & CONES.

A court of equity will not cancel a tax-deed where there has been no fraud practised against the owner of the land, and no substantial injustice done to him, but will ordinarily leave him to his rights and remedies at law; and, therefore, where it appears that the land was taxable, that it had been assessed or valued on oath by the proper officer, and that the taxes had never been paid by the owner, the court will not decree a cancellation of the tax-sale certificates or tax-deeds at the instance of the owner for mere irregularities, especially where the owner makes no offer to pay the amount of taxes justly and equitably due.

(*Before* DILLON, *Circuit Judge.*)

Remedy in Equity against Illegal Taxation. — Revenue Laws of Nebraska.

BILLS in equity to cancel tax-sale certificates held by the respective defendants. The bills make no tender of any taxes, but proceed upon the ground that the tax certificates held by the defendants are wholly void, and that the plaintiffs are entitled to a decree annulling them and quieting their title. The defendants answer, admitting that they purchased said lands for taxes and obtained tax-sale certificates, and subsequently tax-deeds, and insist that the sales, certificates, and deeds are regular and valid. The plaintiffs except to the answers for insufficiency, and insist that the facts averred therein, and the exhibits thereto, do not show any title or right in the defendants. On these exceptions the cases were submitted to the court.

The revenue laws of Nebraska provide, in substance, as follows:

"A certificate of purchase is presumptive evidence of the regularity of all prior proceedings." (Laws of 1875, sec. 5, pp. 132, 133.)

"And a tax-deed properly made and executed shall be *prima facie* evidence of the following facts:

"1. That the property conveyed was subject to taxation.

"2. That the taxes were not paid.

"3. That the same had not been redeemed.

"4. That the property had been properly listed and assessed.

"5. That the taxes were levied according to law.

"6. That the property was properly advertised.

"7. That the property was sold for taxes, as stated in the deed.

"8. That the grantee in the deed was the purchaser.

"9. That the sale was properly conducted.

"10. That all the prerequisites of the law had been complied with.

"And to defeat said deed, the following must be proved:

"1. That the property was not subject to taxation for that year.

"2. That the taxes had been paid before sale.

"3. That the property was not subject to taxation at date of sale.

"4. That the land had never been assessed.

"5. That the same had been redeemed.

"No person can question title under tax-deed until he shows that he had title to the land, and that he has paid all the taxes due." (Laws of 1875, pp. 95, 96.)

Mr. Estabrook, for the plaintiffs.

Crawford & McLaughlin, for the defendants.

DILLON, *Circuit Judge*.—I have carefully examined the records in these causes, and considered the elaborate printed briefs of the respective counsel. I have no time to give in detail an

opinion concerning the many questions argued; nor, in the view I take of the rights of the parties *in this suit and form of proceeding*, is it necessary to do so.

The bills of complaint do not claim that the property was not subject to taxation for the year in question, or that the taxes thereon were in excess of what were its just and proportionate share of the public burdens; or that the plaintiffs, or any one for them, paid or offered to pay these taxes before the sale, or at any time. But the bills of complaint do claim that the lands in controversy were never *assessed* for the year for which they were sold to the defendants for the delinquent taxes thereon.

The statutes of Nebraska provide for the *listing* of taxable property. (Rev. Stats. 894.) The county commissioners are to furnish blanks, etc. (section 5). Shall be listed and valued each year (section 4). Shall embrace all personal and real property (section 6). Every inhabitant shall list (section 13). Shall be signed and sworn to by person making it (section 8). Shall be valued by the assessor (section 11). All property must go upon this list; if the owner, or his representative, fails or neglects or refuses to make the list, then the assessor must do it (sections 9–25). Form of oath by lister (section 8). Assessors to meet as board of equalization on the *first* Monday of April (section 26). This board adjusts the relative value of property among the several precincts, etc.

It seems that the plaintiffs, being non-residents, did not list their property; and it is claimed that the assessor made no list and no valuation of the property on oath; but the assessor alleges the contrary. And the exhibits to the answer show that the assessor made a "return of taxable lands in Stanton precinct, in Stanton county, Nebraska, as assessed for the year 1874," which, as respects the plaintiffs' property, is as follows:

OWNER.	*Part of Section.*	*Section.*	*Township.*	*Range.*	*Acres.*	*Value.*
Walter Craig and E. Clark.....	N. E. ¼	1	21	1 E.	159 75/100	479.25

And various other tracts owned by the plaintiffs in the same manner.

Another exhibit to the answer shows that the assessor took the required oath (section 12), and in which he states, *inter alia*, that "I have diligently, and by the best means in my power, endeavored to ascertain the true amount and value of the property" set forth as above in the assessment roll. And a copy of the tax-list for 1874 shows that the property of the plaintiffs was placed thereon by the same description and valuation set forth in the assessment roll.

I am of opinion that the proceedings of the taxing officers do show that the assessor made an assessment or valuation of the plaintiffs' property *on oath*, and that they are not entitled to a decree as prayed because the assessor, if such was the fact, did not separately value the property in a list by him prepared.

It is urged that the statute requires the oath of the assessor to be *attached* to the roll, and that in this case the oath, although taken and in due form, not being shown to have been *attached* to the roll, the whole assessment is void, and hence there is no assessment, and therefore the entire foundation of the levy and of the right to sell for taxes fails. Whatever may be the effect of a failure to attach the oath to the roll, in an action at law, where the parties stand upon their strict legal rights, I am of opinion that such a failure does not *per se* entitle the owner to the active aid of a court of equity to cancel the tax certificates and deeds.

It is objected to the legality of the tax, that under the head of "value" there is a failure to prefix a $-mark; that the description is uncertain; and that the notice of sale was not sufficient, etc. The first two are technical and unsubstantial—the valuation, or the assessed value, is plain, and the description certain. If the alleged publication of notice of the tax-sale was defective, as claimed, this is no reason for cancelling the certificates and deeds received by the defendants without an offer to pay the amount of taxes justly due from the plaintiffs. Such is the statute of the state, and such the rule of equity as declared

alike by the supreme court of Nebraska (*Hollenbeck* v. *Hahn*, 2 Neb. 377), by the supreme court of the United States (*State Tax Cases*, 2 Otto, 575), and generally elsewhere.

Under the revenue laws of Nebraska, especially, it is a sound principle that where the property is taxable, and has been valued by the proper officer on oath, and no fraud or substantial injustice is shown, mere irregularities in the performance of the duties devolved by law on the taxing officials, unaccompanied with an offer to pay the taxes justly chargeable against the plaintiff's property, are insufficient to call into exercise the active and extraordinary powers of a court of equity, either by way of injunction against the tax-sale or by a decree cancelling the title acquired at such sale. In such cases, equity will ordinarily withhold its aid, and leave the parties to their rights and remedies at law.

EXCEPTIONS OVERRULED.

UNITED STATES, *ex rel.* STANDING BEAR, *v.* GEORGE CROOK, a Brigadier-General of the Army of the United States.

1. An Indian is a *person* within the meaning of the *habeas corpus* act, and as such is entitled to sue out a writ of *habeas corpus* in the federal courts when it is shown that the petitioner is deprived of liberty under color of authority of the United States, or is in custody of an officer in violation of the constitution or a law of the United States, or in violation of a treaty made in pursuance thereof.
2. The right of expatriation is a natural, inherent, and inalienable right, and extends to the Indian as well as to the white race.
3. The commissioner of Indian affairs has ample authority for removing from an Indian reservation all persons found thereon without authority of law, or whose presence may be detrimental to the peace and welfare of the Indians.
4. The military power of the government may be employed to effect such removal; but where the removal is effected, it is the duty of the troops to convey the persons so removed, by the most conven-

ient and safe route, to the civil authorities of the judicial district in which the offence may be committed, to be proceeded against in due course of law. In time of peace, no authority, civil or military, exists for transporting Indians from one section of the country to another, without the consent of the Indians, nor to confine them to any particular reservation against their will; and where officers of the government attempt to do this, and arrest and hold Indians who are at peace with the government, for the purpose of removing them to and confining them on a reservation in the Indian Territory, they will be released on *habeas corpus*.

(*Before* DUNDY, J.)

Habeas Corpus.—Right of Indian to Writ.

THE facts are fully stated in the opinion of the court.

A. J. Poppleton and *John L. Webster*, for the relators.

G. M. Lambertson, United States attorney, for the government.

DUNDY, J.—During the fifteen years in which I have been engaged in administering the laws of my country, I have never been called upon to hear or decide a case that appealed so strongly to my sympathy as the one now under consideration. On the one side, we have a few of the remnants of a once numerous and powerful, but now weak, insignificant, unlettered, and generally despised race; on the other, we have the representative of one of the most powerful, most enlightened, and most christianized nations of modern times. On the one side, we have the representatives of this wasted race coming into this national tribunal of ours, asking for justice and liberty to enable them to adopt our boasted civilization, and to pursue the arts of peace, which have made us great and happy as a nation; on the other side, we have this magnificent, if not magnanimous, government, resisting this application with the determination of sending these people back to the country which is to them less desirable than perpetual imprisonment in their own native land. But I think it is creditable to the heart and mind of the brave

and distinguished officer who is made respondent herein to say that he has no sort of sympathy in the business in which he is forced by his position to bear a part so conspicuous; and, so far as I am individually concerned, I think it not improper to say that, if the strongest possible sympathy could give the relators title to freedom, they would have been restored to liberty the moment the arguments in their behalf were closed. No examination or further thought would then have been necessary or expedient. But in a country where liberty is regulated by law, something more satisfactory and enduring than mere sympathy must furnish and constitute the rule and basis of judicial action. It follows that this case must be examined and decided on principles of law, and that unless the relators are entitled to their discharge under the constitution or laws of the United States, or some treaty made pursuant thereto, they must be remanded to the custody of the officer who caused their arrest, to be returned to the Indian Territory, which they left without the consent of the government.

On the 8th of April, 1879, the relators, Standing Bear and twenty-five others, during the session of the court held at that time at Lincoln, presented their petition, duly verified, praying for the allowance of a writ of *habeas corpus* and their final discharge from custody thereunder.

The petition alleges, in substance, that the relators are Indians who have formerly belonged to the Ponca tribe of Indians, now located in the Indian Territory; that they had some time previously withdrawn from the tribe, and completely severed their tribal relations therewith, and had adopted the general habits of the whites, and were then endeavoring to maintain themselves by their own exertions, and without aid or assistance from the general government; that whilst they were thus engaged, and without being guilty of violating any of the laws of the United States, they were arrested and restrained of their liberty by order of the respondent, George Crook.

The writ was issued and served on the respondent on the 8th day of April, and, the distance between the place where the

writ was made returnable and the place where the relators were confined being more than twenty miles, ten days were allotted in which to make return.

On the 18th of April the writ was returned, and the authority for the arrest and detention is therein shown. The substance of the return to the writ, and the additional statement since filed, is that the relators are individual members of, and connected with, the Ponca tribe of Indians; that they had fled or escaped from a reservation situated some place within the limits of the Indian Territory—had departed therefrom without permission from the government; and, at the request of the secretary of the interior, the general of the army had issued an order which required the respondent to arrest and return the relators to their tribe in the Indian Territory, and that, pursuant to the said order, he had caused the relators to be arrested on the Omaha Indian reservation, and that they were in his custody for the purpose of being returned to the Indian Territory.

It is claimed upon the one side, and denied upon the other, that the relators had withdrawn and severed, for all time, their connection with the tribe to which they belonged; and upon this point alone was there any testimony produced by either party hereto. The other matters stated in the petition and the return to the writ are conceded to be true; so that the questions to be determined are purely questions of law.

On the 8th of March, 1859, a treaty was made by the United States with the Ponca tribe of Indians, by which a certain tract of country, north of the Niobrara river and west of the Missouri, was set apart for the permanent home of the said Indians, in which the government agreed to protect them during their good behavior. But just when, or how, or why, or under what circumstances, the Indians left their reservation in Dakota and went to the Indian Territory, does not appear.

The district attorney very earnestly questions the jurisdiction of the court to issue the writ, and to hear and determine the case made herein, and has supported his theory with an argument of great ingenuity and much ability. But, nevertheless, I

am of the opinion that his premises are erroneous, and his conclusions, therefore, wrong and unjust. The great respect I entertain for that officer, and the very able manner in which his views were presented, make it necessary for me to give somewhat at length the reasons which lead me to this conclusion.

The district attorney discussed at length the reasons which led to the origin of the writ of *habeas corpus*, and the character of the proceedings and practice in connection therewith in the parent country. It was claimed that the laws of the realm limited the right to sue out this writ to the *free subjects* of the kingdom, and that none others came within the benefits of such beneficent laws; and, reasoning from analogy, it is claimed that none but American citizens are entitled to sue out this high prerogative writ in any of the federal courts. I have not examined the English laws regulating the suing out of the writ, nor have I thought it necessary so to do. Of this I will only observe that if the laws of England are as they are claimed to be, they will appear at a disadvantage when compared with our own. This only proves that the laws of a limited monarchy are sometimes less wise and humane than the laws of our own republic—that whilst the parliament of Great Britain was legislating in behalf of the favored few, the congress of the United States was legislating in behalf of all mankind who come within our jurisdiction.

Section 751 of the revised statutes declares that "the supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*." Section 752 confers the power to issue writs on the judges of said courts, within their jurisdiction, and declares this to be "for the purpose of inquiry into the cause of restraint of liberty." Section 753 restricts the power, limits the jurisdiction, and defines the cases where the writ may properly issue. That may be done under this section where the prisoner "is in custody under or by color of authority of the United States, * * * or is in custody for an act done or omitted in pursuance of a law of the United States, * * * or in custody in violation of the constitution or of a law

or treaty of the United States." Thus, it will be seen that when a *person* is in custody or deprived of his liberty under color of authority of the United States, or in violation of the constitution or laws or treaties of the United States, the federal judges have jurisdiction, and the writ can properly issue. I take it that the true construction to be placed upon this act is this, that in *all* cases where federal officers, civil or military, have the custody and control of a person claimed to be unlawfully restrained of liberty, they are *then* restrained of liberty under color of authority of the United States, and the federal courts can properly proceed to determine the question of unlawful restraint, because no other courts can properly do so. In the other instance, the federal courts and judges can properly issue the writ in *all* cases where the *person* is alleged to be in custody in violation of the constitution or a law or treaty of the United States. In such a case, it is wholly immaterial what *officer*, state or federal, has custody of the person seeking the relief. These relators may be entitled to the writ in either case. Under the first paragraph they certainly are—that is, if an Indian can be entitled to it at all—because they are in custody of a federal officer, under color of authority of the United States. And they may be entitled to the writ under the other paragraph, before recited, for the reason, as they allege, that they are restrained of liberty in violation of a provision of their treaty, before referred to. Now, it must be borne in mind that the *habeas corpus* act describes applicants for the writ as "*persons*," or "*parties*," who may be entitled thereto. It nowhere describes them as *citizens*, nor is citizenship in any way or place made a qualification for suing out the writ, and, in the absence of express provision or necessary implication which would require the interpretation contended for by the district attorney, I should not feel justified in giving the words *person* and *party* such a narrow construction. The most natural, and therefore most reasonable, way is to attach the same meaning to *words* and *phrases* when found in a statute that is attached to them when and where found in general use. If we do so in this instance,

then the question cannot be open to serious doubt. Webster describes a person as "a living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race." This is comprehensive enough, it would seem, to include even an Indian. In defining certain generic terms, the 1st section of the revised statutes declares that the word *person* includes copartnerships and corporations. On the whole, it seems to me quite evident that the comprehensive language used in this section is intended to apply to all mankind—as well the relators as the more favored white race. This will be doing no violence to language, or to the spirit or letter of the law, nor to the intention, as it is believed, of the law-making power of the government. I must hold, then, that *Indians*, and consequently the relators, are *persons*, such as are described by and included within the laws before quoted. It is said, however, that this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of *habeas corpus* in a federal court, and *therefore* the court must be without jurisdiction in the premises. This is a *non sequitur*. I confess I do not know of another instance where this has been done, but I can also say that the occasion for it perhaps has never before been so great. It may be that the Indians think it wiser and better, in the end, to resort to this peaceful process than it would be to undertake the hopeless task of redressing their own alleged wrongs by force of arms. Returning reason, and the sad experience of others similarly situated, have taught them the folly and madness of the arbitrament of the sword. They can readily see that any serious resistance on their part would be the signal for their utter extirmination. Have they not, then, chosen the wiser part by resorting to the very tribunal erected by those they claim have wronged and oppressed them? This, however, is not the tribunal of their own choice, but it is the *only* one into which they can lawfully go for deliverance. It cannot, therefore, be fairly said that because no Indian ever before invoked the aid of this writ in a federal court, the rightful au-

thority to issue it does not exist. Power and authority rightfully conferred do not necessarily cease to exist in consequence of long non-user. Though much time has elapsed, and many generations have passed away, since the passage of the original *habeas corpus* act, from which I have quoted, it will not do to say that these Indians cannot avail themselves of its beneficent provisions simply because none of their ancestors ever sought relief thereunder.

Every *person* who comes within our jurisdiction, whether he be European, Asiatic, African, or "native to the manor born," must obey the laws of the United States. Every one who violates them incurs the penalty provided thereby. When a *person* is charged, in a proper way, with the commission of crime, we do not inquire upon the trial in what country the accused was born, nor to what sovereign or government allegiance is due, nor to what race he belongs. The questions of guilt and innocence only form the subjects of inquiry. An Indian, then, especially off from his reservation, is amenable to the criminal laws of the United States, the same as all other persons. They being subject to arrest for the violation of our criminal laws, and being *persons* such as the law contemplates and includes in the description of parties who may sue out the writ, it would indeed be a sad commentary on the justice and impartiality of our laws to hold that Indians, though natives of our own country, cannot test the validity of an alleged illegal imprisonment in this manner, as well as a subject of a foreign government who may happen to be sojourning in this country, but owing it no sort of allegiance. I cannot doubt that congress intended to give to *every person* who might be unlawfully restrained of liberty under color of authority of the United States, the right to the writ and a discharge thereon. I conclude, then, that, so far as the issuing of the writ is concerned, it was properly issued, and that the relators are within the jurisdiction conferred by the *habeas corpus* act.

A question of much greater importance remains for consideration, which, when determined, will be decisive of this whole

controversy. This relates to the right of the government to arrest and hold the relators for a time, for the purpose of being returned to a point in the Indian Territory from which it is alleged the Indians escaped. I am not vain enough to think that I can do full justice to a question like the one under consideration. But, as the matter furnishes so much valuable material for discussion, and so much food for reflection, I shall try to present it as viewed from my own standpoint, without reference to consequences or criticisms, which, though not specially invited, will be sure to follow.

A review of the policy of the government adopted in its dealings with the friendly tribe of Poncas, to which the relators at one time belonged, seems not only appropriate, but almost indispensable to a correct understanding of this controversy. The Ponca Indians have been at peace with the government, and have remained the steadfast friends of the whites, for many years. They lived peaceably upon the land and in the country they claimed and called their own.

On the 12th of March, 1858, they made a treaty with the United States, by which they ceded all claims to lands, except the following tract: "Beginning at a point on the Niobrara river, and running due north so as to intersect the Ponca river twenty-five miles from its mouth; thence from said point of intersection up and along the Ponca river twenty miles; thence due south to the Niobrara river; and thence down and along said river to the place of beginning; which tract is hereby reserved for the future homes of said Indians." In consideration of this cession, the government agreed "to protect the Poncas in the possession of the tract of land reserved for their future homes, and their persons and property thereon, during good behavior on their part." Annuities were to be paid them for thirty years, houses were to be built, schools were to be established, and other things were to be done by the government, in consideration of said cession. (See 12 Stats. at Large, p. 997.)

On the 10th of March, 1865, another treaty was made, and a part of the other reservation was ceded to the government.

Other lands, however, were, to some extent, substituted therefor, "by way of rewarding them for their constant fidelity to the government, and citizens thereof, and with a view of returning to the said tribe of Ponca Indians their old burying-grounds and cornfields." This treaty also provides for paying $15,080 for spoliations committed on the Indians. (See 14 Stats. at Large, p. 675.)

On the 29th day of April, 1868, the government made a treaty with the several bands of Sioux Indians, which treaty was ratified by the senate on the 16th of the following February, in and by which the reservations set apart for the Poncas under former treaties were completely absolved. (15 Stats. at Large, p. 635.) This was done without consultation with, or knowledge or consent on the part of, the Ponca tribe of Indians.

On the 15th of August, 1876, congress passed the general Indian appropriation bill, and in it we find a provision authorizing the secretary of the interior to use $25,000 for the removal of the Poncas to the Indian Territory, and providing them a home therein, with consent of the tribe. (19 Stats. at Large, p. 192.)

In the Indian appropriation bill passed by congress on the 27th day of May, 1878, we find a provision authorizing the secretary of the interior to expend the sum of $30,000 for the purpose of removing and locating the Ponca Indians on a new reservation, near the Kaw river.

No reference has been made to any other treaties or laws, under which the right to arrest and remove the Indians is claimed to exist.

The Poncas lived upon their reservation in southern Dakota, and cultivated a portion of the same, until two or three years ago, when they removed therefrom, but whether by force or otherwise does not appear. At all events, we find a portion of them, including the relators, located at some point in the Indian Territory. *There*, the testimony seems to show, is where the trouble commenced. Standing Bear, the principal witness, states that out of five hundred and eighty-one Indians who went from the reservation in Dakota to the Indian Territory, one hundred

and fifty-eight died within a year or so, and a great proportion of the others were sick and disabled, caused, in a great measure, no doubt, from change of climate; and to save himself and the survivors of his wasted family, and the feeble remnant of his little band of followers, he determined to leave the Indian Territory and return to his old home, where, to use his own language, "he might live and die in peace, and be buried with his fathers." He also states that he informed the agent of their final purpose to leave, never to return, and that he and his followers had finally, fully, and forever severed his and their connection with the Ponca tribe of Indians, and had resolved to disband as a tribe, or band, of Indians, and to cut loose from the government, go to work, become self-sustaining, and adopt the habits and customs of a higher civilization. To accomplish what would seem to be a desirable and laudable purpose, all who were able so to do went to work to earn a living. The Omaha Indians, who speak the same language, and with whom many of the Poncas have long continued to intermarry, gave them employment and ground to cultivate, so as to make them self-sustaining. And it was when at the Omaha reservation, and when *thus* employed, that they were arrested by order of the government, for the purpose of being taken back to the Indian Territory. They claim to be unable to see the justice, or reason, or wisdom, or *necessity*, of removing them by force from their own native plains and blood relations to a far-off country, in which they can see little but new-made graves opening for their reception. The land from which they fled in fear has no attractions for them. The love of home and native land was strong enough in the minds of these people to induce them to brave every peril to return and live and die where they had been reared. The bones of the dead son of Standing Bear were not to repose in the land they hoped to be leaving forever, but were carefully preserved and protected, and formed a part of what was to them a melancholy procession homeward. Such instances of parental affection, and such love of home and native land, may be *heathen* in origin, but it seems to me that they are not unlike *christian* in principle.

What is here stated in this connection is mainly for the purpose of showing that the relators did all they could to separate themselves from their tribe and to sever their tribal relations, for the purpose of becoming self-sustaining and living without support from the government. This being so, it presents the question as to whether or not an Indian can withdraw from his tribe, sever his tribal relation therewith, and terminate his allegiance thereto, for the purpose of making an independent living and adopting our own civilization.

If Indian tribes are to be regarded and treated as separate but dependent nations, there can be no serious difficulty about the question. If they are not to be regarded and treated as separate, dependent nations, then no allegiance is owing from an individual Indian to his tribe, and he could, therefore, withdraw therefrom at any time. The question of expatriation has engaged the attention of our government from the time of its very foundation. Many heated discussions have been carried on between our own and foreign governments on this great question, until diplomacy has triumphantly secured the right to every person found within our jurisdiction. This right has always been claimed and admitted by our government, and it is now no longer an open question. It can make but little difference, then, whether we accord to the Indian tribes a national character or not, as in either case I think the individual Indian possesses the clear and God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence. If the right of expatriation was open to doubt in this country down to the year 1868, certainly since that time no sort of question as to the right can now exist. On the 27th of July of that year congress passed an act, now appearing as section 1999 of the revised statutes, which declares that: "Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and, whereas, in the recognition of this principle the government has freely received emigrants from all nations, and invested them with the rights

of citizenship. * * * Therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."

This declaration must forever settle the question until it is reopened by other legislation upon the same subject. This is, however, only reaffirming in the most solemn and authoritative manner a principle well settled and understood in this country for many years past.

In most, if not all, instances in which treaties have been made with the several Indian tribes, where reservations have been set apart for their occupancy, the government has either reserved the right or bound itself to protect the Indians thereon. Many of the treaties expressly prohibit white persons being on the reservations unless specially authorized by the treaties or acts of congress for the purpose of carrying out treaty stipulations.

Laws passed for the government of the Indian country, and for the purpose of regulating trade and intercourse with the Indian tribes, confer upon certain officers of the government almost unlimited power over the persons who go upon the reservations without lawful authority. Section 2149 of the revised statutes authorizes and requires the commissioner of Indian affairs, with the approval of the secretary of the interior, to remove from any "tribal reservation" any person being thereon without authority of law, or whose presence within the limits of the reservation may, in the judgment of the commissioner, be detrimental to the peace and welfare of the Indians. The authority here conferred upon the commissioner fully justifies him in causing to be removed from Indian reservations *all* persons thereon in violation of law, or whose presence thereon may be detrimental to the peace and welfare of the Indians upon the reservations. This applies as well to an Indian as to a white person, and manifestly for the same reason, the object of the law being to prevent unwarranted interference between the Indians and the agent representing the government. Whether such an extensive discretion-

ary power is wisely vested in the commissioner of Indian affairs or not, need not be questioned. It is enough to know that the power rightfully exists, and, where existing, the exercise of the power must be upheld. If, then, the commissioner has the right to cause the expulsion from the Omaha Indian reservation of all persons thereon who are there in violation of law, or whose presence may be detrimental to the peace and welfare of the Indians, then he must of necessity be authorized to use the necessary force to accomplish his purpose. Where, then, is he to look for this necessary force? The military arm of the government is the most natural and most potent force to be used on such occasions, and section 2150 of the revised statutes specially authorizes the use of the army for this service. The army, then, it seems, is the proper force to employ when intruders and trespassers who go upon the reservations are to be ejected therefrom.

The first subdivision of the revised statutes last referred to provides that "the military forces of the United States may be employed, in such manner and under such regulations as the president may direct, in the apprehension of every person who may be in the Indian country in violation of law, and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the territory or judicial district in which such person shall be found, to be proceeded against in due course of law." * * * This is the authority under which the military can be lawfully employed to remove intruders from an Indian reservation. What may be done by the troops in such cases is here fully and clearly stated; and it is *this* authority, it is believed, under which the respondent acted.

All Indian reservations held under treaty stipulations with the government must be deemed and taken to be a part of the *Indian country*, within the meaning of our laws on that subject. The relators were found upon the Omaha Indian reservation. That being a part of the Indian country, and they not being a part of the Omaha tribe of Indians, they were there without lawful authority, and if the commissioner of Indian affairs deemed their presence detrimental to the peace and welfare of the Omaha

Indians, he had lawful warrant to remove them from the reservation, and to employ the necessary military force to effect this object in safety.

General Crook had the rightful authority to remove the relators from the reservation, and must stand justified in removing them therefrom. But when the troops are thus employed they must exercise the authority in the *manner* provided by the section of the law just read. This law makes it the duty of the troops to convey the parties arrested, by the nearest convenient and safe route, *to the civil authority of the territory or judicial district in which such persons shall be found, to be proceeded against in due course of law.* The *duty* of the military authorities is here very clearly and sharply defined, and no one can be justified in departing therefrom, especially in time of peace. As General Crook had the right to arrest and remove the relators from the Omaha Indian reservation, it follows, from what has been stated, that the law required him to convey them to this city and turn them over to the marshal and United States attorney, to be proceeded against in due course of law. Then proceedings could be instituted against them in either the circuit or district court, and if the relators had incurred a penalty under the law, punishment would follow; otherwise, they would be discharged from custody. But this course was not pursued in this case; neither was it intended to observe the laws in that regard, for General Crook's orders, emanating from higher authority, expressly required him to apprehend the relators and remove them by force to the Indian Territory, from which it is alleged they escaped. But in what General Crook has done in the premises no fault can be imputed to him. He was simply obeying the orders of his superior officers, but the orders, as we think, lack the necessary authority of law, and are, therefore, not binding on the relators.

I have searched in vain for the semblance of any authority justifying the commissioner in attempting to remove by force any Indians, whether belonging to a tribe or not, to any place, or for any other purpose than what has been stated. Certainly, without some specific authority found in an act of congress, or in a

treaty with the Ponca tribe of Indians, he could not lawfully force the relators back to the Indian Territory, to remain and die in that country, against their will. In the absence of all treaty stipulations or laws of the United States authorizing such removal, I must conclude that no such arbitrary authority exists. It is true, if the relators are to be regarded as a part of the great nation of Ponca Indians, the government might, in time of war, remove them to any place of safety so long as the war should last, but perhaps no longer, unless they were charged with the commission of some crime. This is a war power merely, and exists in time of war only. Every nation exercises the right to arrest and detain an alien enemy during the existence of a war, and all subjects or citizens of the hostile nations are subject to be dealt with under this rule.

But it is not claimed that the Ponca tribe of Indians are at war with the United States, so that this war power might be used against them; in fact, they are amongst the most peaceable and friendly of all the Indian tribes, and have at times received from the government unmistakable and substantial recognition of their long-continued friendship for the whites. In time of peace the war power remains in abeyance, and must be subservient to the civil authority of the government until something occurs to justify its exercise. No fact exists, and nothing has occurred, so far as the relators are concerned, to make it necessary or lawful to exercise such an authority over them. If they could be removed to the Indian Territory by force, and kept there in the same way, I can see no good reason why they might not be taken and kept by force in the penitentiary at Lincoln, or Leavenworth, or Jefferson City, or any other place which the commander of the forces might, in his judgment, see proper to designate. I cannot think that any such arbitrary authority exists in this country.

The reasoning advanced in support of my views, leads me to conclude:

1st. That an *Indian* is a PERSON within the meaning of the laws of the United States, and has, therefore, the right to sue

out a writ of *habeas corpus* in a federal court, or before a federal judge, in all cases where he may be confined or in custody under color of authority of the United States, or where he is restrained of liberty in violation of the constitution or laws of the United States.

2d. That General George Crook, the respondent, being commander of the military department of the Platte, has the custody of the relators, under color of authority of the United States, and in violation of the laws thereof.

3d. That no rightful authority exists for removing by force any of the relators to the Indian Territory, as the respondent has been directed to do.

4th. That the Indians possess the inherent right of expatriation, as well as the more fortunate white race, and have the inalienable right to "*life, liberty,* and the pursuit of happiness," so long as they obey the laws and do not trespass on forbidden ground. And,

5th. Being restrained of liberty under color of authority of the United States, and in violation of the laws thereof, the relators must be discharged from custody, and it is so ordered.

ORDERED ACCORDINGLY.

NOTE. — At the May term, 1879, Mr. Justice MILLER refused to hear an appeal prosecuted by the United States, because the Indians who had petitioned for the writ of *habeas corpus* were not present, having been released by the order of DUNDY, J., and no security for their appearance having been taken.

KNEVALS *v.* HYDE.

1. Congress in 1866 made a grant of public land to aid in the construction of the St. Joseph and Denver City Railroad, on each side of the line of that road for the distance of ten sections. On the 28th of March the railroad company, in pursuance of the statute, filed a map of its line in the office of the secretary of the interior. This map was transmitted to the local government land office, but was not recorded until April 13th. On the 11th of April Cropsey entered a

quarter section included in the lands embraced by the map, and a patent was issued to him for the quarter section: *Held*, that the title of the company to the land was valid against Cropsey.

2. The railroad company did not comply with the terms of the statute making the grant: *Held*, that the United States only could take advantage of such failure.

(*Before* MILLER, *Circuit Justice.*)

Title to Government Land.—Priority between Railroad Company and Settler.

IN 1866 congress made a grant of land to the state of Kansas to aid in the construction of the St. Joseph and Denver City Railroad, which road was to run from Elwood, in Kansas, *via* Maryville, to a junction with the Union Pacific Railroad, or any branch thereof.

In pursuance of the terms of the grant, the company filed the map of its line with the secretary of the interior on the 28th of March, 1870. This map was transmitted to the local land office, at Beatrice, where it was received on the 13th of April following.

On the 11th of April one Cropsey entered one quarter section included in the grant, and afterward a patent therefor was issued to him. Knevals claims under the railroad company, and Hyde under Cropsey, and the first question arising in the case was whether the grant to the company took effect when the map was filed with the secretary of the interior or when it was received by the local officers. The grant contained the condition that the road should be built to a junction with the Union Pacific Railroad, or one of its branches, within ten years. The road was built to a junction with the Burlington and Missouri River Railroad in Nebraska, within the time limited, but not to the Union Pacific, and it was objected by the defendant that the Burlington and Missouri Railroad was not a branch of the Union Pacific Railroad, and, therefore, that the condition had been broken and the lands forfeited. It was also objected that Cropsey was a *bona fide* purchaser without notice of the location of the railroad, and therefore was entitled to protection against

its claims. The case was submitted to Mr. Justice MILLER upon the bill and the demurrer thereto, and elaborate printed arguments of the parties. It is said that there are eighteen thousand acres of land in Thayer and Nuckolls counties which are affected by this decision.

Mr. Woodworth, for the plaintiff.

Mr. Wakeley, for the defendant.

MILLER, *Circuit Justice.*—1. I am of the opinion that, within the meaning of the 1st section of the act of congress of July 23d, 1866 (chapter 212), granting lands to the state of Kansas for the use and benefit of the St. Joseph and Denver City Railroad Company, "the line or route of the road" was "definitely fixed" when, on the 28th of March, 1870, a map of said location, adopted by the board of directors of the company, was received by and filed with the secretary of the interior, as the law required. It follows that on that day the right to the use and benefit of the sections of land designated by odd numbers, within ten sections on each side of that line, became vested in the company, including the quarter section now in controversy, unless it had been previously sold, or otherwise came within the excepting clause of the act.

2. The origin of defendant's adverse title is a purchase made from the United States, through its land officers, fourteen days after the rights of the company had vested. The equitable title to the land had, therefore, vested in the company before any interest in it whatever had come to Cropsey, the grantor of the defendant.

3. The rights of the parties in this case are not affected by the question of notice. No other notice was required of the company than filing its map with the secretary of the interior; no other act was necessary on the part of the company to establish its right to the land; no other act could be done by the company toward perfecting the title until so much of the road was built as authorized it to apply for patents for the land, and

it will scarcely be contended that, until the patents issued, any location by purchase from the government could come in and take it up as vacant land. It is probable that the strict legal title passed to the state of Kansas, for the use of the company, by the act of filing the map, and related back to the date of the statute which makes a grant to the state *in presenti* of lands, to be ascertained by the act of locating the route of the road. But it is sufficient to say that on the filing of the map there was vested in the company the equitable ownership of the land—an equity which could only be defeated by failure to perform the conditions of the grant. The power in the officers of the land department to sell the land was gone, and the patent issued by them conferred no real right, though it gave an apparent title. It is not a case, therefore, of notice, but a case of priority of right, in which the prior right must prevail. If it were otherwise, the filing of the map in the office of the commissioner of the general land office, at Washington—the only notice the company could give—was sufficient to require Cropsey to take notice of it.

4. With the question of forfeiture by reason of failure to complete the road, neither defendant nor his grantor has anything to do; they cannot declare such a failure, nor does the loss of the title arise as a legal consequence out of such a failure. The sale to defendant's grantor was not intended to assert such a forfeiture, because at the date of that sale no ground of forfeiture existed. The supreme court, however, has settled the doctrine that in cases of this class the right to declare the forfeiture and resume the grant belongs to the United States, and can only be made effectual by an act of congress or a judicial proceeding. (*Schulenburg* v. *Harriman*, 21 Wall. 44.)

The allegations of the bill demurred to make a case, therefore, in which complainant, being the equitable owner of the land, finds himself embarrassed by an apparent legal title in defendant, and, therefore, entitled to relief in a court of equity.

The demurrer to the bill is, therefore, overruled, with leave to defendant to answer.

ORDERED ACCORDINGLY.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

DISTRICT OF KANSAS.

JAMES R. PAYSON, Assignee in Bankruptcy of Republic Life Insurance Company, *v.* W. G. COFFIN.

1. The two-years statute of limitations in the bankrupt act (Rev. Stats. sec. 5057) applies to an action by the assignee to enforce against stockholders the payment of their unpaid shares.
2. The statute, in such a case, begins to run from the date of the execution of the deed of assignment to the assignee, and not from the date of the assessment on the shares by the bankruptcy court.

(*Before* DILLON, *Circuit Judge.*)

Bankrupt Act. — Statute of Limitations. — Liability of Stockholders.

THE question to be decided is whether the action is barred by the section of the bankrupt act (Rev. Stats. sec. 5057) which provides that no suit at law or in equity shall, *in any case*, be maintainable by or against the assignee, etc., unless the same shall be brought within two years from the time the cause of action accrued for or against such assignee.

Shortly, the facts are these: June 29th, 1870, the defendant subscribed for $5,000, being fifty shares of the stock of the

bankrupt company. On November 14th, 1872, a petition in bankruptcy was filed against the company. December 18th, 1872, the adjudication of bankruptcy having been made, the register duly assigned and conveyed all of the estate of the bankrupt to the assignee, who is the plaintiff here. On February 4th, 1873, on the petition of the assignee, the bankruptcy court ordered an assessment of $60 on every share of unpaid stock. Defendant was sued on this assessment, and on June 9th, 1874, judgment was rendered against him, which he paid. Afterwards, viz., October 17th, 1876, upon the petition of the assignee, the bankruptcy court made another assessment of $10 per share on every share of unpaid stock. On the 12th day of February, 1877, *this action* was brought to recover the assessment made October 17th, 1876.

The charter of the company provides "that the real and personal property of each individual stockholder shall be held liable for any and all losses and liabilities of the company, to the amount of the stock subscribed or held by him and not actually paid in;" and that "in all cases of losses exceeding the means of the corporation, each stockholder shall be liable to the amount of unpaid stock held by him."

Plaintiff avers, in his complaint in this suit, that on the 9th of October, 1871 (the date of the great Chicago fire), "the said company met with losses by fire by which the whole of the cash fund and all of the funds it possessed were exhausted, leaving the company without means of payment, except by assessment upon the capital stock and stockholders."

H. Scott Howell, for the plaintiff.

Clough & Wheat, for the defendant.

DILLON, *Circuit Judge.*—The two-years limitation in the bankrupt act is applicable to actions like the present. (*Walker* v. *Towner*, 4 Dillon, 165; *Scovill* v. *Shaw*, circuit court, district of Massachusetts, October, 1878, before CLIFFORD and LOWELL, JJ.) The assessment upon which this action was brought

was made nearly four years after the adjudication of bankruptcy and the execution of the deed of assignment. The only question is when the statute begins to run. The contention of the plaintiff is that it begins to run only from the time when the assessment of October 17th, 1876, was made. If so, the action is not barred. The contention of the defendant is that the statute commenced to run at least from the time when the deed of assignment was executed. If so, the action is barred. Extended consideration of this question is not necessary, since it has been decided, for reasons that are entirely satisfactory, in the case of *Scovill* v. *Shaw*, *supra*, that the stockholders were liable to the suit of the assignee under the assignment, at any time after it was executed, for the enforcement of their obligations as stockholders. The facts of that case presented the exact question we are called on here to decide, and it was elaborately argued by able counsel.

That was an action by the assignee in bankruptcy of a coal and mining corporation against a stockholder to enforce the payment of amounts alleged to remain unpaid on shares held by the defendant. On April 2d, 1874, the petition in bankruptcy was filed, and on April 29th, 1874, the plaintiff was appointed assignee, and received a deed of assignment. On June 10th, 1876, the bankruptcy court made an assessment, and shortly afterward the action was brought. It was held that the cause of action accrued to the assignee on receiving the deed of assignment, and, as more than two years had elapsed before the suit was commenced, the same was barred. The court held that the cause of action was the defendants' obligation to pay for their stock, and not the assessment by the order of the bankruptcy court. If bankruptcy had not taken place, creditors would have had a remedy; and such remedy is equally open to the assignee. Says CLIFFORD, J., in giving his opinion: "Creditors, after the failure of the corporation, could have brought a bill in equity against the corporation, and joined the stockholders to enforce the payment; and it is equally clear that the assignee might have sued the moment the title to the estate of

the bankrupt was duly conveyed to him as such assignee. Stockholders, under such circumstances, are debtors to the corporation; consequently, the claim against them passed to the assignee, as part of the property, estate, and credits of the bankrupt." (*Terry* v. *Anderson*, 5 Otto, 636.)

JUDGMENT FOR THE DEFENDANT.

ADOLPHUS MEIER *v.* KANSAS PACIFIC RAILWAY COMPANY.

1. Principles upon which receivers should be selected stated.
2. A receiver should be an impartial person, not interested in the litigation or the partisan of any of the litigant parties.
3. Neither a non-resident receiver of a railway corporation, nor more than one receiver, should ordinarily be appointed.
4. Where two receivers were originally appointed as the representatives of different interests which became hostile, leading to dissensions and unnecessary expense, both were removed and a single disinterested resident receiver appointed.

(*Before* MILLER and FOSTER, JJ.)

Railway Receiver.—Appointment.—Removal.

MOTION to remove H. Villard, one of the receivers heretofore appointed by the state court, from whence this cause was removed. Mr. Carlos S. Greeley was the other receiver. The circumstances under which they were appointed, the grounds upon which the removal was sought, and the action of the court and the reasons for such action, appear in the opinions of the judges.

J. P. Usher and others, for the motion.

A. H. Holmes and others, opposed.

MILLER, *Circuit Justice.*—I think the action of Mr. Greeley, in the paper which he sent to the court, relieves the court of the only serious embarrassment which the case presented, namely,

the difficulty of removing one of two receivers who had become hostile to each other in their feelings and actions in relation to their duties, thereby leaving the other in sole possession of the field. As no motion was made to remove Mr. Greeley, and as, therefore, no charges against him were properly before us, it would hardly have been just to him for the court to remove him *sua sponte*. Nor do I think, for reasons which I shall presently suggest, if Mr. Villard was to be removed, and Mr. Greeley remain, that any one should be appointed in place of the former. Mr. Greeley having, with much consideration, expressed to the judges his willingness to give up his receivership if his retaining it would embarrass their actions, we are happily relieved of that difficulty.

I am of opinion that both receivers should be removed, and a single receiver appointed, for the following reasons:

1. The existence of two receivers is unnecessary and embarrassing, even if they were on amicable terms and had but a single place of business at or near the theater of the road's operations. They are obviously unnecessary as regards the successful operation of this road, which I assume to be the principal — if not the only — purpose for which a court should appoint receivers. If they should chance to disagree about the management of the road or the exercise of any functions of their office, as they have done in this case, the difficulty of the successful or proper discharge of their duties becomes manifest. When, in addition to this want of harmony, they establish separate places of business a thousand miles apart, and neither of them within two hundred miles of the road whose operations they are to control, it is apparent, without argument, that the hand of the court which they *are* must be, if not paralyzed, rendered very inefficient and uncertain in its grasp and control of the business of the company.

2. There is no necessity and a manifest impropriety in having a receiver located in New York. It is true, many such western corporations as this have offices in New York, at which much of the financial business of the companies is transacted. But this has always been felt to be a grievance by the people of

the west, whose business the road does, and by which alone it can live, and when such a company comes under the control of a court by reason of its insolvency, and a receiver is appointed to take charge of it, such control as the court can exercise over the operations of the road, and in collecting and disbursing its receipts, can be most safely used, exercised, and more strictly under the eye of the court, by an officer residing within its jurisdiction. I think, therefore, on general principles, and on the facts of this case, there was no necessity for a receiver in the city of New York.

3. I am of opinion that the receivership in New York should be abolished in the interest of economy. Its expenses are unnecessary and excessive. No reason can be perceived for the employment of three firms of lawyers — each firm composed of several members — for any business properly pertaining to the receivership.

4. The main argument against any action by the court is that Mr. Greeley and Mr. Villard were appointed by an agreement between the parties interested, and at their instance, because they represented certain classes of lien creditors of the company, and that to remove Mr. Villard would be to sacrifice one of those interests, or at least to leave it unprotected. There can be no doubt that such was the motive which led to the appointment of two receivers instead of one, and there can be as little doubt that it was a mistake to have done this, whatever the motive. But while a court may very properly conform its action in such a matter to the wishes of all the parties interested in the suit, when their wishes harmonize, it must consider for itself what is proper to be done when that harmony is turned into hostility, so that the two receivers represent two hostile camps, each intent upon securing the whole or the larger share of the spoils. It then becomes a duty of the corut to see that its powers are exercised on principles of strict neutrality as regards the belligerents, and this can only be done in this case by removing the representatives of these hostile interests and appointing a receiver who, in feeling and in conduct, will be strictly neutral and strictly honest. The foundation of the

agreement by which Greeley and Villard were appointed has given way, and the only possible excuse for appointing two receivers is gone. I have only a word to add.

In my view, a receiver is strictly and solely the officer of the court. By reason of the inability or neglect of the officers of the corporation to conduct its business as it ought to be done, the conduct of that business is taken charge of by the court and carried on by its agent. It is the duty of that agent so to conduct the business as that the lawful rights and legal interest of all persons in the property and in the business shall be protected, as far as possible, with equal and exact justice. This is much more likely to be done by a receiver who has no interest in the capital stock of the road, none in its debts, and no obligations to those who have. Such a person, acting under the control of the court, seeking its advice (as he would be inclined to do in all questions of doubtful duty), and bound in a sufficient surety for the faithful performance of his duty, is, in my opinion, the proper one for such an office. While it may be true that a large personal interest may stimulate the activity and direct the vigilance of the receiver, it is equally true that such vigilance, whenever occasion offers, will be directed unduly to advancing that personal interest and that activity to securing personal advantages.

For these reasons, I think that the offices of the two receivers should be consolidated into one, that both the present receivers should be discharged, and that one living in the state in which the road mainly lies, and where its business operations are conducted, and who also has the requisite capacity and knowledge of the business, and the honesty and firmness to discharge his duty faithfully, free from the influence of the hostile interest in the case, should be appointed.

FOSTER, J.—In addition to what has already been said by Mr. Justice MILLER, I have but a few words to offer.

At the time of the appointment of the two receivers in this case, the parties then before the court, or at least the parties controlling the proceedings, plaintiffs and defendants, were act-

ing in harmony, and agreed upon Mr. Villard and Mr. Greeley as the receivers—the former as representing the Denver extension bondholders, and the latter the defendant company and junior securities. The theory of the parties seems to have been that the different interests should be represented and protected by the different receivers. So long as harmony prevailed among these diverse interests, no difficulty was experienced in operating the road under this double management, excepting the additional expense of two receivers and the delay occasioned in transacting the business with their offices a thousand miles apart. But, eventually, the different interests antagonized each other, and whether one party or the other is in fault we need not stop to inquire, for we cannot discriminate between these interests in deciding who shall be the receiver of this property. Suffice it to say, the theory upon which these two receivers were appointed has failed in the practical management of the road, and the only clear way out of the difficulty is to go back to the general principles upon which a court acts in taking the custody of property through its receiver. And nothing can be more apparent than that this officer of the court should stand indifferent between the contending parties. He should act on rules of strict neutrality. He should aim to manage and operate the road to the best advantage, neither favoring one party or the other, but leaving all to seek protection and adjustment of their rights through the adjudication of the court. Upon these principles we must act in this case, and the several reasons so clearly stated by Mr. Justice MILLER, and in which I fully concur, demonstrate not only the necessity but the advantages of such a course.

Therefore, an order will be made removing both Villard and Greeley as receivers, to take effect on some day to be named in the near future, and upon the appointment and qualification of a successor, to whom they will deliver possession of all the property (real and personal), moneys, books, and all other effects of the defendant railway company in their hands as receivers.

ORDERED ACCORDINGLY.

CHARLES L. FLINT *v.* THE BOARD OF COMMISSIONERS OF CRAWFORD COUNTY.

In common law actions in the federal courts, depositions may be taken pursuant to the state law or the act of congress, as parties may elect.

(*Before* MILLER, *Circuit Justice.*)

Practice.—Depositions, Mode of Taking.

THIS was a common law action, in which depositions were taken and certified on behalf of the plaintiff in conformity to the provisions of the statute of the state regulating the practice and procedure in the state courts. The defendant filed a motion to suppress, stating several grounds of objection, based upon the failure of the notice and procedure to conform to the requirements of the act of congress relating to taking testimony by deposition.

John T. Voss, for the motion.

J. D. Campbell, contra.

MILLER, *Circuit Justice.*—The motion to suppress must be denied. In common law actions in the federal courts, where, under the provisions of the act of congress, a case arises in which testimony may be taken by deposition, the parties may follow, in respect to the manner of taking them, either the provisions of the state law or of the act of congress, as they may elect. Since the notice and certificate in this case conform to the provisions of the state statute, I hold that the depositions may be read in evidence. Such has been the practice, so far as I know, in the circuit from the earliest period. Prior to the act of 1872 (Rev. Stats. sec. 914), it is probable that the practice may have rested upon rules of court adopting the state regulations as to taking and certifying depositions; but that act is broad enough to sanction the practice where the local regulations do not conflict with any special provision of the acts of congress on the subject.

MOTION DENIED.

HOWENSTEIN v. BARNES & HAYNES.

1. An instrument in writing, purporting to be a promissory note, is none the less a promissory note because it contains a stipulation to pay attorney's fees if suit be instituted on the note.
2. In the construction of contracts, any interpretation or construction applicable or incidental to their performance should be governed by the law of the place of performance, while such as go to their execution or validity should be determined by the law of the place where they are made.
3. A paper writing for the payment of money in Missouri was executed in Kansas. By the law of Missouri, such writing was not negotiable; by the law of Kansas, it was: *Held*, that the paper was negotiable.

(*Before* FOSTER, J.)

Negotiable Paper.—Attorney's Fees.—Conflict of Laws.

THE facts sufficiently appear in the opinion of the court.

J. Brumback, for the plaintiff.

Peck, Bryan, & Johnson, for the defendants.

FOSTER, J.—The defendants made two certain promissory notes, as follows:

"*2,040.20.* MEDINA, KAS., March 4th, 1877.

"Thirty days after date we promise to pay to the order of Powers, Lynde & Co. two thousand and forty and twenty one-hundredths dollars, at the First National Bank of Kansas City, Missouri, with interest at twelve per cent per annum after maturity until paid, and ten per cent attorney's fees if suit be instituted on this note. The drawers and endorsers hereof jointly and severally hereby waive demand, protest, and notice of non-payment of this note; value received.

"BARNES & HAYNES."

The other note was like this, excepting the date and amount, being dated January 30th, 1877, and for the sum of $2,020. Both these notes were by the payees endorsed and transferred to the First National Bank of Kansas City, within six days after

their respective dates, said bank discounting the notes at their face, less the interest for the time they were to run, and placed the money to the credit of Powers, Lynde & Co., who afterwards checked it out. The defendants, a few days before the respective notes fell due, remitted the money to pay the same to Powers, Lynde & Co., not knowing that they had transferred the notes. Afterwards the First National Bank failed, and Howenstein was duly appointed receiver, and he brings this suit to recover against the makers. These notes appear to have been made in Kansas, and delivered to the payees at the place where they were made. They were made payable in Missouri, at the First National Bank of Kansas City, and were endorsed and transferred to said bank before maturity.

The supreme court of Kansas has decided that such notes are negotiable instruments (*Seaton* v. *Scovill*, 18 Kan. 435, 5 Cent. Law Jour. 184). The supreme court of Missouri has decided that they are not negotiable instruments (*First National Bank* v. *Gay*, 63 Mo. 34, 3 Cent. Law Jour. 465). Neither of these decisions is founded on any statutory provision, but both rest upon constructions of the general principles of the law merchant. The defendants insist, however, that, as the contract was to be performed in Missouri, the parties are presumed to have contracted with reference to the law as decided by the supreme court of that state.

The purpose of interpretation in any case is to ascertain the intention of the contracting parties. But if the intention of the parties cannot be determined from the language of the instrument itself, it is to be sought for in the situation of the parties and the subject matter of the contract, aided by certain rules of construction which are presumed to be in accordance with the intentions of the parties. (Story on Bills, sec. 143; Edwards on Bills, p. 166.) Undoubtedly the place of payment was fixed, in this case, for the convenience of the payees in the notes, as they resided in Kansas City, and held business relations with the bank where payment was to be made. There seems to be some uncertainty as to what rule

governs in the construction and interpretation of contracts made in one state to be performed in another. It has been held that the law of the place of performance is to control as to the construction and interpretation of the contract; and, again, it has been as clearly held that a contract legal by the laws of the place where made is valid, and will be enforced in other jurisdictions. (Story on Promissory Notes, 179; *Tilden* v. *Blair*, 21 Wall. 247.) From the authorities which I have been able to examine, the true rule of construction is this: Any interpretation or construction applicable or incidental to the performance should be governed by the law of the place of performance, and such matters of construction or interpretation as go to the execution and validity of the contract are determined by the laws of the place where the contract was made. This is the rule established by the supreme court in the case of *Scudder* v. *Union National Bank* (91 U. S. 406, 2 Cent. Law Jour. 827). Now, if this case is such a one as calls for the application of this rule of construction, I should say the laws of Kansas would control, because the question is simply this: Are these writings promissory notes? The supreme court of Kansas says they are; the supreme court of Missouri says they are not. They were made in Kansas, and the laws of that state must determine their legal effect. It is a question touching their validity, and goes back to the execution of the papers. It is not reasonable to suppose that the contracting parties intended, by making these notes payable in Kansas City, to restrict their negotiability. If such had been the purpose, a stroke of the pen over the words "*the order of*" would have effected that object completely. Suppose the payees had transferred these notes, while in Kansas City, to a citizen of Kansas, could it be urged against him, because the courts of Missouri hold the paper non-negotiable, that he could not recover in the courts of Kansas? I think not. But it seems to me this case rests upon the general commercial law of the country, and this court is not bound to speculate upon the effect of these conflicting decisions of Kansas and Missouri. (*Mercer County* v. *Hacket*, 1 Wall. 96.) Both of them cannot

be good law; one is right and the other is wrong. The parties are presumed to have contracted with reference to the law as it really is; and it really is the same in both states, for it is a part of the common law of the land, and this court must base its decision on that law. And it seems to me the only way the defendants can be relieved from liability would be to hold that, under the commercial law of this country, these contracts are not promissory notes, because not drawn for an amount certain, by reason of the provision for an attorney fee. And in support of that proposition there are several very respectable authorities. (*First National Bank* v. *Gay*, 63 Mo. 34, 3 Cent. Law Jour. 465; *Samstag* v. *Conley*, 64 Mo. 476; *Woods* v. *North*, 84 Pa. St. 407; *Lowe* v. *Bliss*, 24 Ill. 168.) On the other side, there are many equally respectable authorities. (*Gaar* v. *Louisville Banking Co.* 11 Bush, 180; *Sperry* v. *Horr*, 32 Iowa, 184; *Stoneman* v. *Pyle*, 35 Ind. 103; *Wyant* v. *Pottorf*, 37 Ind. 512; *Walker* v. *Woollen* [Indiana], 4 Cent. Law Jour. 248; *Seaton* v. *Scovill*, 18 Kan. 435, 5 Cent. Law Jour. 184, and cases therein cited.) The reasoning upon which the Kentucky, Iowa, and cases following rest their decisions appears to me to be correct, and the conclusion reached is more in accordance with the advanced views of the present time, and with the general principles established by the supreme court of the United States in *Mercer County* v. *Hacket* (1 Wall. 95), and other cases, sustaining the negotiability of municipal bonds.

The sum of money for which these notes were made is fixed and certain. The amount due at the maturity of the paper—the date when the makers promised to pay—was in no manner indefinite. At all times during the period these notes would have been negotiable were the provision for an attorney fee omitted—*i. e.*, until they were due—they called for a definite and fixed sum of money, and it was only on the contingency there should be a breach of the promise and a suit brought to enforce it that it imposed a further liability. These notes stipulated for interest at twelve per cent per annum *after maturity*. Here is a further liability if not paid when due, and if we are to look

beyond the day of payment fixed in the note, what prophetic vision can foretell what exact sum would be due when the note goes to judgment, or is voluntarily paid before judgment; but no one would contend but it is nevertheless a negotiable promissory note.

It is a hard case for the defendants to be compelled to pay these notes again, and it would also be hard for the creditors of the bank to have to lose the amount; but one party or the other must suffer, and in equity the one most in fault should be the loser. There was a want of caution by the defendants in sending the money direct to Powers, Lynde & Co. before due, without knowing they still held the notes, and being different from the place of payment named in the paper. Undoubtedly they had implicit confidence in the payees, and believed them to be honest men, and so sent the money directly to them in good faith; but that confidence was misplaced, and the defendants are the losers by it. Judgment must go for the plaintiff.

JUDGMENT ACCORDINGLY.

STEVENS *v.* KANSAS PACIFIC RAILWAY COMPANY.

1. Whether state statutes of limitation are applicable to suits by a patentee of an invention against an infringer to compel the latter to account for profits, *quære?*
2. Such suits, when otherwise maintainable, are of equitable cognizance, although no injunction has issued, and although brought after the expiration of the original or extended term of the patent.

(*Before* MILLER, *Circuit Justice.*)

Patent. — Equity Jurisdiction. — Statute of Limitations.

BILL in equity by patentee against an alleged infringer to ascertain the amount of profits arising from the use of the patented invention, and to compel payment thereof. The bill was filed after the expiration of the original and extended term of

the patent — it was brought, indeed, within three days of the lapse of six years after the expiration of the extended term.

Demurrer to the bill on the ground that the matter was exclusively of legal and not of equitable cognizance, and that the suit was barred by the three and five years statute of limitations of the state of Kansas.

Mr. Usher, for the demurrer.

Mr. Walker, *contra.*

MILLER, *Circuit Justice*, orally. — This is a bill by a patentee against an infringer brought after the expiration of the original patent, and also after the expiration of the extended term, but within six years after the expiration of the extension; when suit was brought, six years from the expiration of the extended term had not expired by three days.

Whether the state statute applies to such suits as this I am in doubt; and, as I think it better to plead the statute than to rely upon it by way of demurrer, I shall overrule the demurrer, so far as it rests on this ground, and allow the same defence to be set up by plea or answer.

In regard to the other question: I have no doubt that a bill in equity, when otherwise maintainable, will lie in behalf of a patentee, although the patent has expired and the case is such that no injunction has issued or can issue. The infringer is converted into a trustee for the patentee as to profits made by the former from the use of the patented invention; and this is a sufficient ground of equity jurisdiction of a bill to ascertain the amount of such profits and to compel the infringer to account for the same. No other question is presented or decided.

The demurrer is overruled, and leave is given to plead or answer.

ORDERED ACCORDINGLY.

SINGER MANUFACTURING COMPANY *v.* WASHINGTON MASON.

A plaintiff in an attachment suit in the federal court must furnish security in the same manner as to amount and the qualification and residence of the sureties that the laws of the state require to be furnished if he were proceeding in the courts of the state. (Rev. Stats. sec. 915.)

(*Before* MILLER and DILLON, JJ.)

Attachment Suit.—Bond.—Resident Sureties.—Revised Statutes, Section 915.—Amendment.—New Bond.

MOTION by defendant to discharge the property attached. The grounds of the motion are stated in the opinion.

Ruggles, Hentig, & Sperry, for the motion.

Johnson & Davis, opposed.

DILLON, *Circuit Judge.*—The statute of Kansas provides that no order for the attachment of property shall be issued by the clerk until an undertaking is filed, with one or more sufficient sureties (Code, sec. 192), and such "surety must be a *resident of the state of Kansas*" (Code, sec. 724). An order of attachment was issued by the clerk of this court on an undertaking signed by a single surety, who was and is a resident of the state of Missouri. For this reason the defendant moves to discharge the attachment.

The revised statutes of the United States provide that the plaintiff "shall be entitled to similar remedies, by attachment or other process, against the property of the defendant provided by the laws of the states; * * *provided*, that similar preliminary affidavits or proofs, *and similar security*, as required by such state laws, shall be first furnished by the party seeking such attachment." (Rev. Stats. sec. 915.)

It is our judgment that the plaintiff seeking an attachment in this court against the property of the defendant is required by this section to furnish security in the same manner as to amount and the qualification and residence of the sureties that he would

have to furnish if he were proceeding in the state court. This result is not inconsistent with the point ruled in the case referred to in Woolworth's reports, decided by Justice MILLER.

The motion to discharge the property attached will be sustained, unless the plaintiff will substitute a sufficient undertaking, with resident sureties, within a reasonable time—say fifteen days. There is no statute in Kansas which prohibits such an order, and the statute of amendments, federal and state, is sufficiently liberal to warrant the making of such an order.

ORDERED ACCORDINGLY.

WASHINGTON IMPROVEMENT COMPANY *v.* KANSAS PACIFIC RAILWAY COMPANY.

A proceeding by *mandamus* in the state court, under the statutes of Kansas (Gen. Stats. 1868, p. 766), to compel the defendant company to register the transfer of certificates of stock held by the plaintiff, is a "suit of a civil nature at law" within the meaning of the removal act of March 3d, 1875, and, upon proper application, may be transferred to the circuit court of the United States.

(*Before* MILLER, *Circuit Justice.*)

Removal of Cases.—Act of March 3d, 1875.—Civil Suit at Law, what is.—Mandamus Proceeding to Compel Registration of the Transfer of Stock may be Removed.

ON MOTION to remand cause to the state court. This was a proceeding by *mandamus* brought in the state court pursuant to the state statutes (Gen. Stats. Kansas, chap. 80, p. 766). The object was to compel the defendant company to register the transfer of certain certificates of shares therein of which the plaintiff corporation alleges itself to be the owner; and the plaintiff also prays damages for the wrongful refusal of the defendant to make or allow such registration.

The plaintiff is a corporation created by the state of Pennsylvania; the defendant by the state of Kansas. The defendant

filed in the state court a petition and bond, in apt form and in proper time, for the removal of the cause to this court. The plaintiff moves to remand the same to the state court.

Messrs. Crozier and *Stillings*, for the motion.

Mr. Usher, contra.

MILLER, *Circuit Justice*, orally.—This motion must be denied. This is a "suit of a civil nature at law" within the meaning of the act of congress of March 3d, 1875. The statutes of Kansas so treat it, both in the procedure and the judgment to be rendered. (Gen. Stats. of 1868, p. 766.) It was substantially so held by this court in a case whose judgment was affirmed last winter by the supreme court, in which it was decided that the judgment in *mandamus* had the conclusiveness of judgments in other cases as to matters directly involved and determined. (*Block* v. *Commissioners*, 99 U. S. 686.)

This litigation relates to property rights, and the controversy is a *suit* within the language, purpose, and policy of the removal act. The writ of *mandamus* in such cases as this does not retain its prerogative character, and this is really a civil proceeding to determine the rights of the parties in respect to property. It is my individual judgment that the words "suit of a civil nature at law" do not relate to the form of the suit or proceeding so much as to its substance and nature, and are not to be taken in the restricted sense of being limited to a common law action strictly, but rather in contradistinction from suits in admiralty, in equity, and proceedings of a criminal nature. The present proceeding is, therefore, a suit at law within the meaning of the removal act. The supreme court, in cases familiar to the bar, has defined the word "suit," and has not placed any narrow construction upon it.

A condemnation proceeding in the exercise of the right of eminent domain, where the controversy had assumed the shape of an adversary proceeding in respect to the measure of compensation, and was pending in the state court, was held by the cir-

cuit court for Minnesota (3 Dillon, 465), and on error by the supreme court (98 U. S. 403), to be removable from the state to the federal court.

The motion to remand is denied. MOTION DENIED.

W. W. ARMSWORTHY *v.* MISSOURI RIVER, FORT SCOTT, AND GULF RAILROAD COMPANY.

The case of *Stroud* v. *Missouri River, etc. Railroad Co.* (4 Dillon, 396) followed; and it was held in this case that, under the provisions of the treaty referred to, the actual settler whose improvements were wholly upon the west half of a quarter section of land was only entitled to buy the portion of the quarter section on which the improvements had been made.

(*Before* DILLON and FOSTER, JJ.)

Construction of the Rights of Settlers under the Treaty Relating to the Ceded Neutral Lands in Kansas.

SUIT by complainant to acquire the legal title to the south-east quarter of section four, township twenty-eight, range twenty-five, in Crawford county. The facts appear in the opinion of the court.

Hill & Sallee, for the plaintiff.

Wallace Pratt, and *Blair & Ferry*, for the defendant.

FOSTER, J.—The material facts in this case are precisely like those in the case of *Stroud* v. *Missouri River, etc. Railroad Co.* (4 Dillon, 396), excepting that the *improvements* in this case are all on the *west half* of the quarter section, and the complainant makes claim for the whole quarter, as in the Stroud case. In that case the improvements being on every sub-division of the quarter, the question which arises in this case was not passed upon.

In the first *proviso* of article 17 of the treaty, the rights of the

actual settler who has made improvements of the value of fifty dollars and occupies the land for agricultural purposes at the date of the signing of the treaty are clearly defined. In making his proofs, he was entitled to buy at the appraised value the smallest quantity of land in legal sub-divisions which would include his improvements—not exceeding, however, in the aggregate, one hundred and sixty acres. Under the second *proviso*, as it was originally drafted, the secretary of the interior might sell all these neutral lands in a body, for not less than $800,000 cash. This *proviso* was general and sweeping in its terms, and did not save the rights of the settlers in the event of such a sale. When the treaty came before the senate for ratification, July 27th, 1866, this last *proviso* was stricken out, and the following inserted in lieu thereof: "*Provided*, that nothing in this article shall prevent the secretary of the interior from selling the whole of said land not occupied by actual settlers at the date of the ratification of this treaty, not exceeding one hundred and sixty acres to each person entitled to pre-emption under the pre-emption laws of the United States, in a body, to any responsible party, for cash, for a sum not less than one dollar per acre." This amendment to the treaty was evidently intended to protect the actual settlers on these lands in the event they were sold in a body. But it imposes a further limitation to the first *proviso* of the article—that is, the settler must have been entitled to pre-emption under the pre-emption laws of the United States in order to be entitled to a preference in the purchase of the land; and it extended the time from the signing to the date of the ratification of the treaty.

1. Was it intended by this amendment to do more than impose this personal qualification and extend the time, leaving the *value* and kind *of the improvements* and the *quantity* of land to be determined by the first *proviso?*

2. Or was it intended to go further, and confer all the rights of the pre-emption laws as to *improvements* and *quantity* of land, etc., on the settler?

3. Or was it intended, as claimed by the plaintiff, that to

the personal limitation was also given the right of the pre-emption laws as to the *quantity* of land, leaving the kind and value of the *improvements* to be determined by the first *proviso?*

If the second theory is the correct one, then the rights of the settler are to be determined by the provisions of the pre-emption laws of the United States, not only as to the person, but also to the kind of improvements and the quantity of land to which he is entitled, and the provisions of the first *proviso* are immaterial. Certain rights were given the settler if the land was sold in parcels, and entirely different rights given, and restrictions imposed, if the land was sold *en masse.* So it would result, from such a construction, that any individual settler might or might not be entitled to his improvements, depending upon which way the secretary of the interior should happen to sell these lands. It does not seem reasonable that it was the purpose of this amendment to go to that extent. We can see no reason why such a wide distinction should be made, or why the court should construe the law as making such difference. Now, if it was not intended to remit the settler to the pre-emption laws for his rights *in toto,* was it intended to do so in part—*i. e.,* as to the *quantity* of land to which he was entitled, but not as to the *improvements?* This is what the plaintiff contends for, but we cannot find a reason for such a construction of the act, unless it be to compensate for the *personal* restriction imposed.

No one would contend that it is in the power of courts, in construing statutes, to apportion advantages to compensate for disadvantages. That is a legislative power, and we can only declare what the law is, not what it ought to be.

Holding, as we do, that these *provisos* are *in pari materia,* as intimated in the Stroud case, and construing them together, there is still an unmistakable difference as to the rights of the settler in the two cases. In the one case the settler need not be entitled to pre-emption rights under the laws of the United States; in the other case he must be—that is, he must have the personal qualifications of a pre-emptor—such as citizenship, being the head of a family, or widow, or a single person twenty-one years

of age, and not owning three hundred and twenty acres of land elsewhere, nor have abandoned his residence on his own land in the state to reside on these lands. Such restrictions might well have been deemed proper to cut off adventurers and speculators, who might go on to these lands without a *bona fide* intention of remaining and making a home. Further than this, and the extension of the time of settlement, we cannot think this amendment qualified the first *proviso*. It may be argued that such construction imposes a restriction on the settler in the one case without giving any compensating benefits therefor. But if that were true, the hardship of the case would not alone be a controlling consideration. But is it true? It extends the time named in the first *proviso* from the date of signing the treaty to the date of its ratification; and as to the original *proviso* for which this was substituted, it seems to have been intended by its terms to cut off the rights of the settlers altogether in case the lands were sold *en masse*.

The secretary of the interior was authorized to sell the whole of these lands in a body. There were eight hundred thousand acres of these ceded neutral lands, and it provided for selling them as a whole for $800,000 in gross, which would be one dollar per acre, making no deduction for the lands of settlers. If it was the intention to reserve those lands, it is altogether probable the price to be paid for the body of these lands would have been governed to some extent by the amount of lands remaining after deducting the improved lands. The amendment saved the rights of the settlers, and further provided for a sale as a whole of the remainder of the lands for one dollar per acre.

It is hardly probable that this *proviso*, which was substituted for one saving *nothing* to the settlers, was intended to enlarge the rights given by the first *proviso* of this article, or to fix a different rule as to improvements or the quantity of land reserved to the settler. Under our view of the law, the complainant was entitled to buy only the west half of said quarter section at the appraised value.

DECREE ACCORDINGLY.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

DISTRICT OF MINNESOTA.

SUSAN HAMILTON *v.* JOHN ROLLINS; SAME *v.* SHUBAEL D. TODD *et al.*; SAME *v.* LEVI BUTLER *et al.*; SAME *v.* GEORGE SHERWOOD.

1. Letters-patent No. 51,310, to Palmer Hamilton, for "improvement in saw-mills," is valid, and was not anticipated by the Staub patent, No. 7943.
2. A patentee may assign his right to recover for infringements occurring before the assignment.

(*Before* NELSON, J.)

Patent for Invention.—Assignment of Right to Recover for Previous Infringements.

THESE causes were heard together on pleadings and proofs. They were brought for a perpetual injunction and an account of profits made by alleged infringements of letters-patent No. 51,310, issued December 5th, 1865, to Palmer Hamilton, the original and first inventor, for "a new and useful improvement in saw-mills."

Susan Hamilton, the complainant, became the owner of the patent and commenced these suits, claiming under the following deed of assignment from the patentee, viz.:

"Whereas, I, Palmer Hamilton, of Detroit, in the county of Wayne, and state of Michigan, did obtain letters-patent of the United States for an improvement in operating saws in saw-mills (patent No. 51,310), which letters-patent bear date December 5th, 1865; and whereas, Susan Hamilton, of Detroit, in the county of Wayne, and state of Michigan, is desirous of acquiring an interest therein: now, this indenture witnesseth, that, for and in consideration of the sum of one dollar to me in hand paid, and other valuable considerations, the receipt of which is hereby acknowledged, I have assigned, sold, and set over to said Susan Hamilton all the right, title, and interest which I have in said invention, as secured to me by said letters-patent, and my whole right and interest in all infringements of said patent, and actions in law for damages for such infringements; the same to be held and enjoyed by the said Susan Hamilton for her own use and behoof, and for the use and behoof of her legal representatives, to the full end of the term for which said letters-patent are granted, as fully and entirely as the same would have been held and enjoyed by me had not this assignment been made.

"In testimony whereof, I have hereunto set my hand and affixed my seal, this 18th day of April, 1873.

"*Detroit, Michigan.* PALMER HAMILTON. [SEAL.]

"Witnesses: M. A. HAMILTON.
J. S. SHAFER."

W. E. Hale and *Geo. H. Lothrop*, solicitors for complainant.

Lochren, McNair, & Gilfillan, and *Lamprey & James*, for defendants.

NELSON, J.—These suits are brought by the complainant, an assignee of the patentee, to recover damages for infringements of the patent No. 51,310, granted to Palmer Hamilton, December 5th, 1865, for "improvement in saw-mills."

The defences set up in all the cases are—

1st. Want of novelty.

This patent was sustained in the case of *Ives et al.* v. *Hamilton* (92 U. S. 426). It is there described as "an improvement in saw-mills, and consists of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting rod or pitman, straight guides, pivoted cross-head, and slides or blocks and crank-pin, or their equivalents, at the opposite end, * * * giving to the saw, in its downward movement, a rocking or rolling motion, by means of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head working in straight guides, and pivoted to the pitman below the saw with the crank-pin."

The defendants rely upon the Staub patent, No. 7943, issued in 1851, to sustain this defence. In the case above cited, this patent was not spread on the record, and the supreme court did not consider it. I have examined the drawing of the invention and claim of the patentee, and find it is not the combination used in the Hamilton patent. Staub obtains a similar result (a vibratory motion of the saw), but the means devised for producing the motion, and not the result, is the claim made by Hamilton, and for which he was granted a patent. In Staub's patent, the saw is fixed at the upper end between two blocks, and at an angle to the perpendicular of forty-five degrees, or thereabouts, are placed grooved guides in which the blocks with saw attached slide. These guides are fastened to and supported by the saw frame, which consists of two upright standards with a cross-bar at the top running from each to the guides. The opposite end of the saw is fastened directly to a short rod connected to the extremity of a fly-wheel, so that, passing upwards and downwards by the rotary motion of the wheel, the saw retreats from and advances towards the log, describing in its movement nearly a circle. Between the guides, and running in the same direction, is fitted to the upper end of the saw a rod with spiral spring coiled around it, which strains the saw in descending by opposing its descent, and by its tension draws up the sliding blocks and upper end of the saw, and thus prevents it from bending during its upward and downward movement.

Hamilton obtains a vibratory motion to the saw by the cross-head to which the saw at the upper end is attached sliding in curved guides with the concave part towards the log, and the opposite end of the saw oscillating slightly by being attached to the pitman rod above the cross-head.

The design of the inventors of both combinations is to secure a motion similar to that given a whip-saw by men in a saw-pit, but the means employed by each are different. The curved guides above and the straight guides and lever pitman below, all of which comprise the Hamilton mechanical combination, are not found in the Staub patent.

2d defence. No right of action to recover for infringements occurring before the assignment.

This defence is not intended to apply to all the cases, but, so far as it does, cannot be sustained.

Ordinarily, a cause of action in tort is not assignable. This rule, however, has reference to strictly personal torts, but rights of action for damages, and claims growing out of and adhering to property, will pass by assignment. The deed of assignment introduced is sufficient to convey the rights vested in the original patentee, and all his interest in infringements, to the complainant. She can, therefore, maintain these suits, and a decree will be entered accordingly for a perpetual injunction and an account, with costs.

DECREE ACCORDINGLY.

GEORGE B. WARREN *v.* THE CITY OF ST. PAUL, J. C. MCCARTHY, *et al.*

1. Municipal corporations with power to make contracts, and to sue and be sued in respect thereto, may, in the absence of special legislative restriction, compromise a disputed claim, and the settlement is binding on the municipality and its taxpayers, unless it can be impeached for fraud.
2. The city of St. Paul possesses this power, and it is not restricted by the creation of the board of public works.

Warren *v.* St. Paul.

3. A taxpayer cannot overhaul or question the settlement, fairly made by a municipal corporation, of a disputed claim arising under a contract not *ultra vires*.

(*Before* NELSON, J.)

Municipal Corporations.—Power to Settle Disputed Claims.—Remedy of Taxpayer.

THIS action is brought to forever restrain the city of St. Paul from allowing, recognizing, or paying eight thousand four hundred and ninety-five dollars and fifty-one cents ($8,495.51), or any part thereof, claimed by the defendants, McCarthy, Butler, and Eaton, on account of the grading of lower Third street in said city.

The city of St. Paul undertook, in May, 1873, to grade this part of one of its public thoroughfares, and to that end its board of public works, having authority in the premises, duly advertised for proposals for doing the work, fixing a time and place for receiving bids. Prior to such advertisement, the city engineer was directed to make an estimate of the amount of earth required to bring the street up to the proposed grade. The ground to be filled was bog or marsh, and the earth deposited thereon would sink, more or less, from its own weight, but the estimate made did not include any sinkage, and was limited to measurements from the surface of the street to the grade line. The approximate quantity required to make the filling complete to the grade line was computed to be fifty-four thousand eight hundred cubic yards. This estimate was posted up in the engineer's office, and contractors seeking information were referred to it by him and his subordinates.

The defendants, McCarthy, Butler, and Eaton, under the name of J. C. McCarthy & Co., offered to do the work for the sum of $18,975, and their bid was accepted, and a contract duly entered into between the city and themselves.

The contractors, by the 23d of June, 1874, had deposited more than the number of cubic yards of earth specified in the approximate estimate, and fully one-half of this amount had

disappeared below the original surface of the street, and, on a measurement made the last of May, 1874, it was found that the amount of earth in sight was less than on the first of the month, although five thousand yards had been put on the street during the month, and between April 6th and June 12th about eighteen thousand yards had disappeared in the same way. The city authorities insisting on a strict performance of the contract, and more than ninety thousand cubic yards of earth being required to bring the street to grade, the contractors, in view of the facts, stopped work June 23d, 1874, and demanded payment for the value of the work done, for which they threatened to sue the city, claiming that they had been deceived by the city authorities as to the quantity of work to be done, and by the representations of the city engineer under the directions of the board of public works.

The contractors had been paid upon the contract $9,630.04, and the balance claimed by them to be justly due for work performed was nearly $9,000. After several efforts were made for an adjustment of the claim against the city, a special committee was appointed by the common council and an investigation had, and a report was made, with the concurrence of the city attorney, recommending a settlement.

The common council of the city adopted the report of its committee, which allowed the sum of $8,495.51 as a compromise, *payable out of the local improvement fund*, and was proceeding to make the payment when the complainant, the owner of certain city lots fronting the street to be graded, brought this suit in the district court of Ramsey county, in this state, and a temporary injunction was obtained. The suit was removed to this court under the act of congress of March 3d, 1875. The city of St. Paul suffers a default.

I. V. D. Heard, for the complainant.

Morris Lamprey and *George L. Otis*, for the defendants, McCarthy, Butler, and Eaton.

NELSON, J.—The corporation of the city of St. Paul is, under its charter (chap. 1, sec. 1, 1874), invested with all the general powers possessed by municipal corporations at common law, including the power to contract for the grading of streets, and can sue and be sued upon such contracts. It may, therefore, lawfully take any steps which an individual could, to arrange all differences growing out of such contracts by an amicable settlement and adjustment. It could relieve from performance, refer to arbitration, or compromise by agreement, and the question of expediency in so doing is left entirely to its judgment. Unless collusion between the officers of the corporation and contractors is shown, or fraud exists, nothing less than a legislative restriction can prevent the exercise of this power by the proper authorities. (See Dillon on Municipal Corporations, sec. 398, and numerous authorities cited.) Endowed with liberal and plenary authority, the corporation must necessarily, for the general welfare of its inhabitants, and incident to the powers expressed in the charter, possess an inherent right to adjust all disputed claims, and a decision *bona fide* made by the proper corporate officers, is final and conclusive. I do not understand this proposition to be disputed, but it is said that the creation of a board of public works in the charter, and the law compelling the owners of the property benefited to pay for local improvements, have limited and restricted the right ordinarily conferred upon the common council of a municipal corporation, with reference to compromising and adjusting claims growing out of public improvements. I find nothing in the city charter intrusting this power to any other than the governing body. The common council are specially intrusted with the care, supervision, and control of all public thoroughfares and public improvements within the city limits (charter 1874, chap. 4, sec. 7). An executive department, entitled "the board of public works," was organized and constituted by chapter 6, but nothing therein limits this general supervision and care conferred upon the council.

The execution of contemplated local improvements ordered

by the common council, and assessments for the expenses thereof, are intrusted to this department, but the power to initiate all improvements relating to the grading of streets, etc., emanates from the former, and, by a unanimous vote of the members thereof, can be ordered irrespective of the approval or disapproval of the board of public works (charter 1874, chap. 7, sec. 5).

In view of these provisions of the charter, and applying thereto the ordinary principles of construction, the common council, acting in behalf of the corporation, are authorized to exercise the power of compromising or submitting to arbitration disputed claims against the city, to be paid out of such funds as are provided by law to meet any and all liabilities incurred, and additional legislation is unnecessary.

The charter, as amended in 1876, merely defined the manner in which the common council might submit any matter to arbitration, and restricted the exercise of the power already existing to a two-thirds vote. The repeal of this section left it, as before, to a majority.

A taxpayer may, perhaps, by injunction, restrain the corporate authorities from a misappropriation of money raised by taxation; but when the proposed appropriation is to settle a disputed claim arising under a contract not *ultra vires* and within the scope of their powers, a court will not interfere. It is urged that the common council acted upon a mistaken idea as to the law governing the rights of the corporation in the premises. Admit it, and the case is not altered. The compromise is a matter of discretion and judgment, exercised in a manner deemed for the best interests of the city. If unwisely adopted, it is an error of opinion as to the expediency of an adjustment, and does not originate in any bad motive. The report of a committee of investigation in favor of this settlement, and the concurrence therein of the city attorney, after a full examination of the facts, were first obtained before any compromise was favored by the council.

I lay out of view entirely the position assumed by counsel,

that the city was not liable in any event, and the contractors could not enforce, by suit, their claim. This question does not enter into a decision of the case, and to my mind the fact that the city might successfully interpose a defence if suit was commenced by the contractors is immaterial when bad faith is not alleged.

The action of the common council recognized the existence of a contract between the city corporation and the defendants named, and presupposes a liability to pay something.

It is urged that the complainant can have no relief if denied in this suit. The stringency of the local assessment or improvement provisions of the charter affects both resident and non-resident property-holders alike. When enacted, the statute was regarded as beneficial and necessary to an equitable and proper exercise of the general powers of the corporation. If experience has demonstrated it to be harsh and cumbersome, and illy adapted to subserve the interests of the city, an appeal should be made to the legislature to modify it or substitute some other more simple and less expensive mode of making improvements. While such provisions are embodied in the charter, and the corporation is in good faith proceeding to enforce them, the fact, if true, as stated, that no relief can be had by a taxpayer interested, except in the manner pointed out in the law, can afford no justification for judicial interference.

BILL DISMISSED.

EDWARD C. NETTLETON *v.* DORILUS MORRISON.

A conveyance of land by a minor is voidable, not void, and where he disaffirms such act after coming of age, by conveying to a third person, the grantee in such subsequent conveyance, though taking the same with notice of the prior deed, is entitled to a decree quieting the title in himself without restoring the consideration paid for the voidable conveyance.

(*Before* NELSON, J.)

Nettleton *v.* Morrison.

Conveyance of Realty by Minor.—Disaffirmance by Subsequent Conveyance.

THIS is an action to quiet title. The complainant purchased a tract of land from Norbert Grignon, and received a conveyance of the same January 27th, 1876, which was properly recorded. The defendant claims under a prior deed executed June 8th, 1874, by Peter Zanzius, in the name of Norbert Grignon, by virtue of a power of attorney dated May 30th, 1874, properly executed to him by the latter.

It is admitted that Grignon represented himself in the power of attorney as of lawful age, but was a minor when he executed it, and that he received the proceeds of this sale of the property; also, that he executed the deed to the complainant January 27th, 1876, just one year after he arrived at majority, and has never restored the money received from the defendant.

S. L. Pierce, for the plaintiff.

Bradley & Morrison, for the defendant.

NELSON, J.—The minor having received the consideration for the property at the time of the conveyance under the power of attorney, made the deed his own act, and it was voidable, not void. When the previous deed to the defendant was revoked, the parties thereto were left to their legal rights and remedies. The defendant could recover from the minor the money paid, on account of failure of consideration, and, perhaps, under the circumstances, might subject him to a criminal prosecution, but he cannot insist in this suit that the complainant must restore to him the money paid out, as a condition of the relief asked. Although the complainant had notice of the previous transfer by the record of the deed and the power of attorney, it is evident he also knew that Grignon was not bound by it, and could avoid it.

DECREE AS PRAYED.

ISRAEL G. LASH *v.* WILLIAM S. HARDICK, ANNA J. HARDICK, ORLANDO B. TURRELL, and THE FARMERS' AND TRADERS' BANK.

1. By the statute of Minnesota (Rev. Stats. p. 339, sec. 21), judgment creditors, as respects unrecorded deeds, are put upon the same footing as *bona fide* purchasers for value.
2. The possession under the unrecorded deed, in this case, was not of such a character as to charge the judgment creditor with notice of the rights of the grantee.

(*Before* NELSON, J.)

Recording Act of Minnesota. — Judgment Creditor. — Unrecorded Deed. — Possession. — Notice.

ON June 6th, 1870, the sheriff of Dakota county, Minnesota, under a power of sale in a mortgage executed by William S. Hardick and Anna J. Hardick, his wife, sold the property in controversy — the west half of the southeast quarter of section thirty (30), township one hundred and fifteen (115), range nineteen (19) — eighty acres of land — and delivered a certificate of sale to the purchaser, Palona Atherton, which was duly recorded June 14th. On June 2d, 1871, Hardick and wife, being anxious to redeem from the sale, applied to the defendant, O. B. Turrell, the agent of Lash, the complainant, for a loan of money which would enable them to redeem, and agreed to execute to Lash a mortgage upon this and other property as security, which was granted, and, in pursuance of the arrangement, Turrell purchased and took an assignment of the sheriff's certificate of sale, and a deed of the property, from Palona Atherton, June 2d, 1871, both of which were duly recorded August 1st, 1871.

After the fee had matured in Turrell of record, he conveyed the property to Mrs. Hardick, and Hardick and wife executed, on the last day of July, 1871, antedated June 2d, 1871, a note and mortgage for $2,500 to Lash, which was recorded August 1st, 1871. The deed from *Turrell to Mrs. Hardick was never*

recorded, and is not produced on the hearing, having been lost. On June 2d, 1873, Turrell, as agent of Lash, renewed the loan to defendants, Hardick and wife, and took a new note and mortgage, duly recorded June 17th, 1873. Anna J. Hardick resided on a forty-acre tract adjoining the premises until October, 1876, and during this year leased the property to one Johnson, whose farm, upon which he resided, was two miles distant. Johnson never lived upon the premises, nor recorded his lease, but had plowed a portion of the eighty acres lying south of a road cutting the land diagonally in nearly two equal parts, and cultivated it that year. A person by the name of Sawyer resided on the land in controversy, but is admitted by all parties to be a trespasser.

On December 23d, 1876, the defendant bank obtained a judgment in a suit theretofore commenced against O. B. Turrell and William R. Marshall, for the sum of $2,047.31, which was duly docketed on that day in the clerk's office of the district court of the county in which the land is situated, and on February 27th, 1877, execution was duly issued against the property of Turrell and Marshall, and within the proper time the writ was levied on the land described aforesaid as the property of O. B. Turrell, and was duly sold by the sheriff of said county, and the bank having made a bid of $2,157.23, the land was struck off to it, and a certificate of sale, according to the statute of Minnesota, duly executed and delivered by the sheriff on the same day, and the writ was returned satisfied, according to law. On April 25th, 1877, the certificate was properly recorded in the office of the register of deeds of said county.

This suit is brought by Lash to foreclose the mortgage executed by Hardick and wife, June 2d, 1873, and is resisted by the bank, which claims title to the land, and in its answer denies any notice, actual or otherwise, of the unrecorded deed from Turrell to Anna J. Hardick, or of the mortgage from Hardick and wife to Lash, until after the entry and docketing of its judgment against Turrell and Marshall.

Allis & Allis, for the complainant.

Claggett & Searles, for the defendant bank.

NELSON, J.—It would seem, from the above facts, that the bank has sustained its defence to the bill of complaint, unless there was sufficient notice to put it upon inquiry which would have furnished information respecting the true condition of the property. The registry law is intended to give information to persons dealing with real estate relating to transfers and incumbrances, and for their protection from secret conveyances. (*Patterson* v. *De La Ronde*, 8 Wall. 300.) The record did not show title out of Turrell when the judgment was docketed, and the bank can rely upon the knowledge obtained therefrom.

If, however, it had actual notice, or its equivalent, of the existence of the deed from Turrell to Mrs. Hardick, nothing can be claimed by virtue of its judgment, for equity would give no better title than Turrell possessed. Actual notice before the docket entry is not asserted. The record of this mortgage was not constructive notice of title out of Turrell (*Mills* v. *Smith*, 8 Wall. 27), and the bank, having traced title to him out of whom the registry did not carry it, was not required to look further for protection.

The statute (Rev. Stats. Minn. p. 330, sec. 21) enacts that an unrecorded mortgage "shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate, or any portion thereof, whose conveyance is first duly recorded, or as against any attachment levied thereon, *or any judgment lawfully obtained* at the suit of any party against the person in whose name the title to such land appears of record, prior to the recording of such conveyance."

This act protects judgment creditors, as *bona fide* purchasers for a valuable consideration, whose liens arise while the record title appears in the judgment debtor, although in fact he may have conveyed the property. (*Edes* v. *Greenleaf*, 2 Minn. 272.) The bank is, by the statute, placed on an equality with *bona*

fide purchasers, and is governed by the same rule. (*Lamberton* v. *Bank*, 2 N. W. Law Rep. 56.)

The proceedings subsequent to the entry of judgment, and the title, when completed by a sale, relate back, and the time of purchase becomes as of the date of the docket entry.

It cannot be doubted that a *bona fide* purchaser for a valuable consideration, without notice, having a deed from Turrell executed subsequent to the unrecorded deed of Mrs. Hardick, would hold the property if his deed was put on record; and equally can the bank, unless the facts proved in regard to the possession of Mrs. Hardick, through Johnson, the lessee, make it fraudulent to insist upon its judgment to the prejudice of Lash. There was no open, notorious, and exclusive possession at the time the judgment was docketed, December 28th, 1876, sufficient to warn any person, or suggest any inquiry into the condition of the title, and no greater consideration can be claimed, on account of neglect to make inquiry, than if it had been made and the facts ascertained. The possession of Mrs. Hardick of the property in controversy, after the unrecorded deed to her from Turrell, was in no manner different or changed from what it had been before. She lived on the adjoining tract. Now, she had moved out of the state, and a trespasser was the only person residing on the land. Johnson, the lessee, lived two miles distant, and his possession was not so exclusive and of such public notoriety that it could be readily ascertained by those seeing the property. At the time of the entry of the judgment, and thereafter, the visible condition of the property was not inconsistent with the record title in Turrell.

It is admitted that after the docket entry of the judgment against Turrell, and before the execution was levied by the sheriff, the bank, through its cashier, had notice from Turrell, by letter, that he had made a conveyance of the property in 1871 to Mrs. Hardick, but this fact cannot affect the right secured by the statute. No principle of estoppel can be applied. The bank obtained its judgment in good faith, and the statute gives it a priority. To deprive it of this legal advantage by

notice of an unrecorded deed after the lien attached, would nullify the statute, and a judgment creditor would not fare as well as a *bona fide* purchaser without notice.

Decree will be entered dismissing the bill as to the bank.

DECREE ACCORDINGLY.

CORNELIUS MCCABE, Assignee in Bankruptcy, *v.* PAUL MCKINSTRY.

1. Criteria of sales and bailments in respect of grain in warehouses and elevators stated.
2. Parol evidence of the manner in which and the purpose for which the grain was received and the use made of it, is admissible, in connection with the receipt of the warehouseman, to determine whether, as between the immediate parties, the transaction was a sale or bailment.
3. The act of the legislature of Minnesota of March 3d, 1876, "to regulate the storage of grain," construed in connection with *Rahilly's Case* (3 Dillon, 420).

(*Before* DILLON, *Circuit Judge.*)

Warehouse Grain Receipts.—Sale.—Bailment.—Evidence.

WRIT of error to the district court. The plaintiff is the assignee in bankruptcy of the Winnebago City Mill Company. The action was brought to recover $576.65 alleged to have been received by the defendant of the bankrupt April 20th, 1876, as a fraudulent preference under the bankrupt act. On May 1st, 1876, the mill company filed its voluntary petition in bankruptcy, and on the next day was adjudged to be a bankrupt. On March 20th, 1876, the defendant authorized Cussens, the secretary of the mill company, to purchase certain wheat for him, which was done, and the following instrument executed, viz.:

"*550 bushels.* WINNEBAGO CITY, MINN., March 20th, 1876.

"Received of Paul McKinstry, five hundred and fifty bushels of No. 1 hard wheat, at his risk in case of fire, and free of storage until sold.

"WINNEBAGO CITY MILL CO.,
"*Per* J. M. CUSSENS, *Secretary.*"

The wheat was delivered to the mill company. What was done with it, or what use was made of it, does not appear from the bill of exceptions. The money value of the wheat was afterwards, April 20th, 1876, paid to the defendant and this receipt surrendered. It does not appear that this wheat, or any wheat, was on hand when this payment was made.

This is the payment in respect of which the recovery is sought, on the ground that it was a fraudulent preference.

There was a trial by jury and a judgment for the plaintiff. The defendant sues out a writ of error, and relies, to reverse the judgment, upon the following exceptions appearing in the bill of exceptions:

"The plaintiff offered to show by the said witness that the wheat specified in said receipt as received from Paul McKinstry (which was the same wheat for which defendant was charged with having received the sum of money alleged in the complaint) was not received for the purpose of being stored or bailed, but was received for the purpose of being ground into flour at the mill of the said bankrupt, and to be paid for in money by said company, and that that was the intention of the parties; to the introduction of which evidence the counsel for the defendant then and there objected, on the ground that the said receipt was in the nature of, and was, a contract in writing, and expressed the intention of the parties, and could not be altered or impeached by parol proof."

After the evidence was concluded, the defendant by his counsel asked the court to charge the jury as follows:

"*550 bushels.* WINNEBAGO CITY, MINN., March 20th, 1876.

"Received of Paul McKinstry, five hundred and fifty bushels of No. 1 hard wheat, at his risk in case of fire, and free of storage until sold.

"WINNEBAGO CITY MILL CO.,
"*Per* J. M. CUSSENS, *Secretary.*"

First. "That if the jury believe that the wheat for which McKinstry received the money was receipted for by a receipt similar to the above in form and date, that the same was a bailment of property, and not a sale, and that the assignee cannot impeach the receipt or contract expressed as above by parol proof;" which instruction the court refused to give, and to which refusal so to charge the defendant by his counsel then and there duly excepted.

Second. "That if the jury believe that the paying of McKinstry by Cussens, for the mill company, was upon and for the wheat receipt similar to the above, that the same was not a fraudulent preference in the law." The court refused so to charge the jury, and to which refusal the defendant by his counsel then and there duly excepted."

The following is the act of the legislature of the state of Minnesota referred to in the opinion of the court:

"AN ACT TO REGULATE THE STORAGE OF GRAIN.

"*Be it enacted by the Legislature of the State of Minnesota:*

"SECTION 1. That whenever any grain shall be *delivered for storage* to any person, association, or corporation, such *delivery* shall in all things be deemed and treated as a bailment, and not as a sale of the property so delivered, notwithstanding such grain may be mingled by such bailee with the grain of other persons, and notwithstanding such grain may be shipped or removed from the warehouse, elevator, or other place where the same was stored. And in no case shall the grain so stored, and which such bailee may hereafter be required to keep on hand, be liable to seizure upon any process of any court in an action against such bailee.

"SEC. 2. Whenever any grain shall be *deposited* in any warehouse, elevator, or other depository for *storage*, the bailee thereof *shall issue and deliver* to the person so storing the same a receipt or other written instrument, which shall, in clear terms, state the amount, kind, and grade of the grain stored, the terms of storage, and if advances are made, the words 'advance made;' which receipts shall be *prima facie* evidence that the holder thereof has in store with the party issuing such receipt the amount of grain of the kind and grade mentioned in such receipt; and any warehouseman, proprietor of an elevator, or bailee who shall issue any receipt or other written instrument for any grain *received for storage*, which shall be false in any of its statements, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine not exceeding three hundred dollars, or imprisonment in the county jail not exceeding three months, or by both such fine and imprisonment.

"SEC. 3. It shall be the duty of every person, association, or corporation *receiving* any grain *for storage*, upon the demand of the bailor, or his assigns or representatives, and tender of all charges for storage and money advanced by the bailee, and upon the faith and credit of such bailment and offer to surrender the receipt or other written instrument evidencing the receipt of such grain for storage, to deliver to the person entitled thereto a quantity of grain equal in amount and of the kind and grade delivered to such bailee. Every person and every member of any association or corporation who shall, after demand, tender, and offer, as provided in section three (3) of this act, wilfully neglect or refuse to deliver to the person making such demand, the full amount of grain of the kind and grade which such person is entitled to demand of such bailee, shall be deemed guilty of larceny, and shall be punished by fine or imprisonment, or both, as is prescribed by law for the punishment of larceny.

"SEC. 4. Whenever, upon any demand, tender, or offer, as provided in section three (3) of this act, any such bailee shall neglect or refuse to deliver any grain received for storage, or a quantity of grain equal in amount and of the same kind

and grade as received, any such bailor, or his assigns or representatives, may commence, in any court having jurisdiction thereof, an action against such bailee to recover possession of a quantity of grain equal in amount and of the same kind and grade delivered to such bailee; and in every action it shall be the duty of the sheriff, or other proper officer, to take into his possession, from the warehouse of such bailee, or other place where he may have the same, a quantity of grain equal in amount and of the same grade as that specified in the affidavit made or writ issued in such action. Such action shall be commenced and prosecuted, if in district court, in the manner provided in actions for the claim and delivery of personal property; and if in justice court, in the manner provided in actions for replevin.

"SEC. 5. Warehouse receipts given for any goods, wares, merchandise, grain, flour, produce, or other commodity stored or deposited with any warehouseman or other person or corporation in this state, or bills of lading or receipts for the same when in transit by cars or vessels to any such warehouseman or other person, shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon: *Provided*, that all warehouse receipts or bills of lading which shall have the words 'not negotiable' plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

"SEC. 6. No person *receiving* or *holding* grain in *store* shall sell or otherwise dispose of or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the express authority of the owner of such grain and the return of the receipt given for the same, except as herein provided.

"SEC. 7. It shall be unlawful for any warehouseman, or owner or keeper of any elevator, or any agent of either, to mix

together any grain of different grades so received in store, or to select different qualities thereof of the same grade for the purpose of storing or delivering the same, or attempt to deliver grain of one grade for another, or in any way to tamper with any grain of other persons while in his possession or custody, with a view to securing any profit to himself or any one, without the consent of the owner.

"SEC. 8. Any warehouseman or other person violating any of the provisions of section six (6) or section seven (7) of this act, shall be deemed guilty of a felony, and, upon conviction, shall be fined in a sum of not over one thousand dollars, or imprisonment in the state prison of this state not exceeding five years, or both.

"SEC. 9. This act shall take effect and be in force from and after its passage.

"Approved March 3d, 1876."

Gilman, Clough, & Lane, for the plaintiff (defendant in error).

Andrew C. Dunn, for the defendant (plaintiff in error).

DILLON, *Circuit Judge*.—Grain may be disposed of by the owner to a warehouseman, or to an elevator or mill proprietor, either by sale or bailment. In the former the title passes; in the latter it remains with the owner. It is sometimes difficult to determine whether a particular transaction is a sale or bailment. If a specific amount of grain is deposited by the owner, which is not to be changed by the bailee, but retained until called for, when the identical grain is to be restored, this is, of course, a plain case of bailment. Under the Minnesota statute of March 3d, 1876, however it might be in the absence of such an enactment, a specific amount of grain deposited for storage does not cease to be a bailment, and does not become a sale, because it is mingled by the warehouseman, or elevator or mill proprietor, with the grain of other persons, since the statute authorizes the intermixture of grain of the same kind and grade, and recognizes the continued ownership of the depositors to a quantity of grain

equal in amount to that by them respectively deposited. Prior to the enactment of the statute just mentioned, it was decided, in *Rahilly's Case* (3 Dillon, 420), where there was an express contract, or an agreement implied from the known and invariable course of business, that the warehouseman or elevator proprietor might mingle specific wheat received with other wheat of like kind and grade, and ship or sell at his pleasure, with the further agreement or understanding that, on demand, he would pay the person from whom the grain was received the highest market price, or deliver the same amount of grain of a like quality, but not the identical grain deposited, nor grain from any specific mass, that such a transaction was a sale at the time of the delivery, and not a bailment.

There is an inherent difference between bailments and sales. If I deposit my wheat to be stored and safely kept for me, my property remains, and I extend no credit to the bailee. But if I leave my wheat with him with authority to sell it for his own benefit, and not as my agent, and upon his promise to pay me the value of the wheat, or to give me a like quantity of wheat when I shall demand it, the transaction is in essence a sale of my wheat and the extending by me of a personal credit for its value. I see no satisfactory evidence that the act of the Minnesota legislature of March 3d, 1876, meant to abrogate essential distinctions between bailments and sales, so far, at least, as to place the grain owner who authorized the warehouseman to sell, and the grain owner who only authorized him to store and safely keep, upon the same footing. Let me illustrate. Suppose I deliver one thousand bushels of wheat to a warehouseman, or elevator proprietor, with authority to sell, and it is sold; and the next day you deliver to him one thousand bushels to store, and he does so; the next day he fails with your one thousand bushels on hand, and no more. Was it intended by the Minnesota legislature that I might take the one thousand bushels by replevin, or even share it *pro rata* with you? It seems to me not. The act, although not carefully drawn, and in many of its provisions far from clear, seems throughout to confine its remedial

provisions to persons who deposit grain "for storage" or safe keeping, and not to those who deposit it with authority to sell.

The act is conceded to have been passed in consequence of the decision in *Rahilly's Case*, and I have felt, in view of the facts of that case, considerable embarrassment in ascertaining the precise scope of the act, although its general purpose is manifest.

While it must be admitted to have made important provisions to protect persons who deliver grain for storage, I am inclined to think that it was not intended to embrace the case of persons who deliver grain to the warehouseman with express authority to sell the same on his own account, and upon an understanding that he is to pay the value of a like quantity of grain, or to deliver a like amount, upon demand; nor to embrace the case of one who leaves wheat with a miller with authority, as in *Randell's Case* (Law Rep. 3 P. C. 101), to use it as part of his current consumable stock, and upon an agreement to pay the farmer or owner the value, or to deliver a like quantity when demanded.

The 1st section of the Minnesota act, if it stood alone, might be construed to cover cases such as those just mentioned, but the 6th section forbids the warehouseman or other person "receiving or holding grain in store to sell or otherwise dispose of or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the express authority of the owner of such grain and the return of the receipt given for the same." No more effectual protection can be given to depositors of grain than this requirement that their grain shall not be sold, disposed of, or delivered out of the warehouse or the place where it is stored, without their consent. Unless the depositors otherwise agree, the grain deposited, or, at all events, an equal amount of the same grade, is always kept on hand, and, without their consent, the bailee is not authorized to sell it or to consume it, and substitute other grain in its place. If it is wrongfully sold or disposed of, it may be true that the owner's rights will attach to other grain substituted in its place, or to any grain which the bailee may own, but we have no occa-

sion now to discuss or determine the point. (See 2 Kent's Commentaries, 590, 12th ed.—Mr. Holmes' note.)

In case of the insolvency of the warehouseman, or mill or elevator proprietor, where the grain on hand does not equal the amount of outstanding receipts, a person who has authorized his wheat to be sold or consumed, and pursuant to which authority it has been sold and removed or consumed, cannot come in competition, as respects grain on hand, with depositors for storage only, who have never authorized any sale, disposition, or removal of their grain.

The act authorizes the depositor of grain for storage to demand and receive a receipt therefor; makes it criminal to issue a fraudulent receipt; makes the receipt negotiable and to stand for the grain, so that whoever owns the receipt owns the grain; makes it larceny wilfully to neglect or refuse to deliver the grain, and criminal to sell, dispose of, or deliver the grain without the authority of the owner and the surrender of the receipt. Under this statute the warehouseman must be careful what kind of receipts he issues. If the contract under which the grain is received is one for storage, this excludes any implied right arising from custom or usage to sell or dispose of or deliver the grain out of the warehouse.

For the protection of the depositor, the authority to sell or ship or remove the grain must be express; and for the protection of the public, the receipt given for the same must be returned.

Difficult questions may arise under this act as to the respective rights of depositors where there has been a wrongful sale or removal of the grain, and where there is not enough grain for all; but this case does not require us to consider them.

The record before the court is meagre in the statement of the facts. *Prima facie*, the receipt issued is one for storage; but it would appear to be remarkable if the real understanding was that the grain should not be used—that the mill company would be willing, as a business transaction, to store it free of charge for an indefinite time.

In my judgment, the receipt is not of such a nature as necessarily to exclude all parol evidence to show the character of the transaction, and to show by the acts and conduct of the parties that the wheat therein mentioned was bought for the purpose of being manufactured into flour, and was so manufactured, with the knowledge or consent of the defendant, soon after it was received.

The district judge states that his notes show the undisputed evidence was that defendant was the president of the bankrupt mill company; that he bought the wheat to enable the mill to carry on its operations; that the secretary issued to him the receipt; that the wheat was almost immediately made into flour, with the defendant's knowledge, but the receipt was not surrendered until a short time before the bankruptcy, when the money was paid to the defendant. The bill of exceptions rests upon the proposition that, even if such were the facts, it is not competent, in view of the terms of the receipt and the provisions of the statute, to show these facts, or similar facts, by parol evidence. True, it is not competent to allow a witness to state what he intended by the use of the language in which the receipt was couched, but the bill of exceptions, taken as a whole, does not show that this was permitted. The contention of the defendant seems to have been, if such a receipt was given, that no state of case could be shown by parol evidence which would make him liable to the assignee in bankruptcy. Such a proposition is too broad to be sound, and, if adopted, might be the means of not only working a fraud upon the bankrupt act, but upon *bona fide* grain depositors under the local statute.

Parol evidence to show the circumstances under which the grain was received, the custom and mode of doing business, the use made of the grain with the consent of the depositor, etc., has often been admitted in cases like the present. (*Rahilly* v. *Wilson*, 3 Dillon, 420; *Randell's Case*, Law Rep. 3 P. C. 101; *Chase* v. *Washburn*, 1 Ohio St. 244; *Lonergan* v. *Stewart*, 55 Ill. 44.) The only change in this respect made by the local statute is that the

authority to sell must be "express," but it need not necessarily be in writing.

I regret that the bill of exceptions is not more full and precise, but, as I construe it, no error is affirmatively disclosed, and the judgment below is affirmed.

AFFIRMED.

JOHN S. KENNEDY *et al.* *v.* THE ST. PAUL AND PACIFIC RAILROAD COMPANY *et al.*

1. A court of chancery, in the progress of a foreclosure suit against a railroad company, ought not to enter upon the work of building or completing a railroad unless there is an irresistible necessity to do so, in order to prevent a great and certain sacrifice of the rights and securities of the parties in interest.
2. Under the extraordinary circumstances of this cause, the trustees and four-fifths of the bondholders consenting, and none opposing, the court, in order to prevent the forfeiture of the franchises of the company and the loss of a valuable land grant, authorized the receiver to construct the unfinished portions or links of the road, out of moneys to be furnished by bondholders; but the court refused to issue debentures as a means of credit in advance of actual construction, or to permit the receiver to incur, for construction purposes, any indebtedness beyond the amount of money furnished by the bondholders. When the road should be fully completed, the order provided for the payment of the actual cost thereof by debentures, which should be a lien upon the property to the extent indicated.
3. Under this order, one hundred and twenty-five miles of railway were built, and the lines of the company's road completed, and the forfeiture prevented, and debentures were then issued for the cost of construction, and were afterwards paid out of the proceeds of the sale of the property under the decree. (See note.)
4. Right of non-assenting bondholders to impeach decree and sale, and proper mode of procedure. (See note.)

(*Before* DILLON and NELSON, JJ.)

Kennedy *v.* St. Paul and Pacific Railroad Company.

Railway Mortgage.—Foreclosure.—Authority to Receiver to Build Unfinished Parts of the Road, to Save Forfeiture of Franchises and Land Grant.

THE cause is now before the court on the application of the receiver for authority to construct the unfinished portions of the road, and to issue debentures to raise money for that purpose. Shortly, the material facts are these:

A suit was originally instituted by and in behalf of mortgage bondholders against the railroad company and others, including the trustees in the mortgage. (See *Kennedy* v. *St. Paul and Pacific Railroad Co.* 2 Dillon, 448.) Afterwards, in virtue of proceedings under the power in that behalf contained in the mortgage, the original trustees were removed, and Wetmore and others were duly appointed in their places. The new trustees thus appointed, having duly accepted the trusts, brought a bill to foreclose the mortgage or deed of trust for $15,000,000, dated April 1st, 1871, mentioned in the former report in 2 Dillon, 448, 450. The St. Paul and Pacific Railroad Company and the First Division Company, and others, were made defendants. Under the former order made in the case (2 Dillon, 448), the receiver, Mr. Farley, only expended in the work of construction and repair about $100,000. Meanwhile, the receiver has preserved the property and operated the road without loss, and with some small profit. The completed parts of the road were links or fragments, and of comparatively little value unless the whole line should be finished. The amount of road completed and not completed appear in the Kennedy case above cited. The disputes incident to the bankruptcy of the company and the failure of its enterprise have prevented the company, the bondholders, or the receiver from completing the construction of the extension lines, and the litigation cannot be brought to a speedy close.

The legislature of Minnesota, on March 9th, 1878, passed an act providing for the forfeiture of the company's franchises and lands, as respects the unfinished lines of its road, unless a speci-

fied number of miles should be built by August 1st, 1878, another part by December 1st, 1878, and to St. Vincent by January 1st, 1880, etc. (Special Laws 1878, p. 344.) The act provided that "in case the said St. Paul and Pacific Railroad Company, its successors or assigns, should fail to complete any of said portions of said line of railroad within the times therefor limited in this section, in that case the portions of said line of railroad then remaining uncompleted, together with the land grant, rights, franchises, immunities, and property appertaining thereto, shall at once be and become *absolutely forfeited* to the state of Minnesota, without any act or ceremony whatsoever."

The foreclosure cause is not ready for final hearing, and no decree can be rendered in time to enable the purchasers thereunder to complete the road and save the forfeiture. Under these circumstances, the receiver, at the instance of Mr. George Stephen and other large bondholders, and with the concurrence of the new trustees, presented a petition to the circuit judge for authority to construct the uncompleted lines of road and issue debentures for the cost thereof.

On the 18th of April, 1878, the following order was made:

"*John S. Kennedy et al.*
v.
"*The St. Paul and Pacific Railroad Co. et al.*

"The above entitled cause having come on to be heard upon the order made herein April 8th, 1878, on the petition of J. P. Farley, receiver, that the defendants and all lienholders show cause why the said receiver should not be authorized to issue the debentures of said company to construct the uncompleted portions of the St. Vincent extension of the St. Paul and Pacific Railroad, and it appearing that due service of said order was made as required therein, and after hearing I. V. D. Heard, solicitor for the said receiver, in support of said application, and George L. Otis, Esq., solicitor for the plaintiffs herein, and for Jacob S. Wetmore, Thomas W. Pearsall, and Thomas Denny, trustees under the $15,000,000 mortgage described in the complaint,

in concurrence with and in support of said application, and noting the protest of the Northern Pacific Railroad Company, and of the First Division of the St. Paul and Pacific Company, filed in the cause, it is hereby ordered, for the purpose of fully advising the court in the premises, that Mr. John B. Henderson and Mr. Thomas C. Reynolds, of the state of Missouri, be appointed a commission of examination and inquiry to report all of the facts necessary to enable the court to judge of said application, and, *inter alia*, to ascertain and report as to the following matters:

"1. The cost of completing and equipping the sections of road between Melrose and Fergus Falls, and between Fergus Falls and Barnesville, and between Snake River and St. Vincent.

"2. The names of the owners of the bonds under said mortgage, and the number and amount held by each owner or representative of each owner.

"3. How many of such bond owners propose to take debentures, and in what sums, and to procure their formal agreement as to the amount of money they will advance on the security of such debentures. Also, the formal assent of the said new trustees to the issue of debentures for the purposes desired.

"4. What guaranties should be required by the court, that the necessary money will be furnished and the road completed to St. Vincent, and at least to Fergus Falls by January 1st, 1879.

"5. Whether, for the security and protection of the parties in interest, it is sufficient to provide that, if enough money is not furnished to complete said sections of road entire, that then the debentures negotiated shall only be a lien on an equal footing with the mortgage bonds, except on the lands earned with the moneys so furnished.

"6. In case sufficient moneys are furnished, and the said sections of road are fully completed, then what priority shall be given to the debenture holders—shall it extend to the entire road and lands, or only to uncompleted road and lands, or to whole road without lands, and if to lands, whether it should be limited

to the lands hereafter earned or extended to lands heretofore earned as well.

"7. What should be the form and terms of payment of debentures and of the lien security therefor.

"8. What provisions should be made to secure the just rights of bondholders who do not join in the scheme, and herein, as to an order allowing any bondholder, before a sale, to pay his proportion, with interest, and stand on an equal footing with the other debenture holders.

"9. What provision ought to be made about sale of lands on hand, and as to their appraisement and mode of sale, and whether proceeds shall be pledged for payment of debentures, or how otherwise disposed of. What is the value of the lands already earned, and what the value of the lands to be earned.

"10. What provision should be made as to the issue and registry of debentures, and whether they should be issued only as sections of road are completed, upon the order of the court, and what provisions to securing the economical expenditure of money in construction.

"11. The commissioners, or one of them, will hear any of the plaintiffs or any of the defendants, touching the order applied for, on seasonable application.

"12. After examination and inquiry, and full consideration of any matters submitted to them, said commissioners will make a report and a recommendation either for or against the proposed order, and if in favor, then to accompany the report with the draft of an order embodying their recommendations; and they will report with all convenient speed.

"Dated at Jefferson City, Missouri, this 18th day of April, 1878.

"JOHN F. DILLON, *Circuit Judge.*"

The commissioners, after a full examination, made a report as to the situation of the property, the cost of construction, the value of the lands which had been earned and of those that would be lost if the road was not completed as required by the

act of the Minnesota legislature, and as to the wishes of the bondholders, the ability of Mr. Stephen and others to furnish the necessary money to complete the road, and the character of the lien which should be given for the security of the debentures, and recommended the granting of the receiver's application.

The following opinion was given May 31st, 1878, on the application of the receiver to be authorized to construct the road and issue debentures.

George L. Otis, for the trustees.

I. V. D. Heard, for the receiver.

H. R. Bigelow, for the First Division of the St. Paul and Pacific Railroad Company.

John B. Sanborn and *George Gray*, for the St. Paul and Pacific Railroad Company.

George B. Young, for Mr. Stephen and other bondholders.

DILLON, *Circuit Judge*.—An application is made by the receiver for authority to complete the unfinished portions of the said railroad, and to issue debentures to raise the means of construction. The situation of the case is peculiar, and even extraordinary. The cause in which the receiver was appointed, as well as the foreclosure cause by the new trustees, is still pending, and it is certain that a final decree cannot be rendered in time to save the forfeitures provided for in the act of the legislature of Minnesota of March 9th, 1878. Unless the road is constructed as required by that act, the rights of the railroad company, as respects the unfinished road, and as respects the lands appertaining thereto, will be forfeited, and the principal security of the bondholders secured by the mortgage will be wholly lost. The fragments of road already completed would, in that event, be comparatively of little value. If the line of the railway is completed, it is clear that the effect will be to make the parts already completed

more valuable. The mortgage bonds outstanding greatly exceed the value of the property. Four-fifths of all the bondholders apply for the order. Not a single bondholder has appeared to oppose it. The trustees in the mortgage, representing all the bondholders, ask that the order be made. A commission appointed by the court has examined the railroad and the lands, and ascertained the wishes of the bondholders, and recommend that the desired authority be given by the court. The only parties not consenting are the holders of stock in the St. Paul and Pacific Company and the First Division Company. But the interests of the stockholders and of the bondholders of the St. Paul and Pacific Company are, in the actual situation of the case, antagonistic, and the stock is of no value. Even the mortgage bonds are worth, in the market, but a few cents on the dollar. The First Division Company, itself hopelessly insolvent, and whose road is in the hands of trustees under mortgages, has no substantial interest of value in the matter. The opposition to the order asked for is not of a nature to defeat the application if the order is one which ought otherwise to be made.

I assent, in the fullest manner, to the proposition that a court of equity ought not to enter upon the work of either operating or building a railway, if this can possibly be avoided without the certain and great sacrifice of the rights and securities of the parties in interest. The original order in this case was made upon this principle and upon the exceptional case which the record presented (*Kennedy* v. *St. Paul and Pacific Railroad Co.* 2 Dillon, 448). It is not to be inferred from the report of that case that authority even to complete the building of an unfinished line of railway, and to issue debentures for that purpose, is to be conferred without an overwhelming and irresistible necessity. When such authority is conferred, it ought to be guarded with the utmost care.

I have given to the present application great and even anxious consideration. It is the first step that costs. The work of constructing the unfinished lines had better not be entered upon than to enter upon it and fail, leaving the road still unfinished.

That would not improve the security, and would greatly add to the existing embarrassments and complications.

Although the commission has recommended debentures as a means of raising the money necessary to complete the road, I have, on consideration, concluded not to authorize their issue, or to permit the receiver to incur any indebtedness whatever for this purpose.

What I am willing to authorize the receiver to do, on the conditions and restrictions to be specified in the order, is: Out of moneys to be furnished him by the parties in interest, and not otherwise, to proceed to construct and equip the unfinished portions of the road at the lowest cost in cash; the receiver to be prohibited from contracting any debt or liability under this order in excess of the money actually furnished to and received by him. The parties in interest asking for the order must execute an instrument agreeing to furnish money sufficient to complete the road; and the trustees, for the bondholders, and the bondholders' committee, must also formally assent to this order. When the receiver shall fully complete the road in such a manner as to be accepted by the state of Minnesota, and in accordance with the acts of congress and of the state, so as to secure to the company the lands granted by congress and the state, then the court will direct the receiver to issue debentures for all sums of money advanced to and used by the receiver for the construction and equipment of the road, which debentures, unless the court shall hereafter otherwise order, shall be a first lien on all the lines of road not now completed, and on all lands which the road constructed under this order shall be the means of earning and acquiring. The order must also contain a provision by which any bondholder, at any time before the issue of debentures, or, if the court shall so order, at any time before the sale of the property under the decree, may place himself on the footing of those bondholders who shall advance the money to the receiver under this order.

The court will pass an order drawn up in conformity with this opinion.

ORDERED ACCORDINGLY.

Kennedy *v.* St. Paul and Pacific Railroad Company.

NOTE.—In conformity with the foregoing opinion, the following order was entered:

"*John S. Kennedy et al.*
v.
"*The St. Paul and Pacific Railroad Co. et al.*

"This cause having come on to be heard on the 18th day of April, A. D. 1878, at Jefferson City, in the state of Missouri, on the application of J. P. Farley, Esq., receiver of the defendant, the St. Paul and Pacific Railroad Company, to be authorized to issue the debentures of said company for the purpose of constructing the uncompleted portions of said railroad, and to sell lands pertaining to the completed portions thereof, and the court, for the purpose of fully advising itself in the premises, having then appointed a commission of examination, to report all the facts necessary to enable the court to judge of such application, and said commission having so reported, and the court being fully advised in the premises, it is hereby ordered:

"That the order heretofore made in this cause on the 1st day of August, A. D. 1873, appointing a receiver for said company, and authorizing him, among other things, to issue certain debentures, as modified by an order made herein on the 1st day of September, A. D. 1873, be further modified and supplemented as follows:

"1. Said receiver shall issue no debentures, in addition to those already issued, except as hereinafter provided, and only when specially ordered by the court to do so; but those already issued shall continue to have the liens and preferences heretofore secured to them by the orders of this court.

"2. Whereas, George Stephen, Donald A. Smith, Norman W. Kittson, and James J. Hill represent and show to the court that they are the equitable owners of $11,400,000 of the $15,000,000 issue of bonds secured by the extension mortgage of April 1st, 1871, as shown and set forth in an agreement between them, as parties of the first part, and Chemet & Weetjen, Kirkhoven & Co., Lippman, Rosenthal & Co., Wurfbain & Son, Tutein, Nolthenius & De Hann, H. C. Voorhoeve & Co., and Johan Carp, the committee of the Dutch bondholders of the St. Paul and Pacific Railroad Company, parties of the second part, being an agreement of twenty-seven articles, dated March 13th, 1878, and which said $11,400,000 of bonds are held by John S. Kennedy & Co. (the plaintiffs herein), as trustees, as shown in said agreement; and whereas, the said Stephen, Smith, Kittson, and Hill propose to advance and furnish, or cause to be advanced and furnished, the full sum necessary to complete and equip the said extension lines to St. Vincent, and from Melrose at least to Fergus Falls, as required by the act of the legislature of the state of Minnesota, approved March 9th, 1878, in time to save the forfeiture therein provided for, and to secure the land grant to the com

pany, if the court will, in this cause, authorize the receiver to construct and equip the said extension lines on such terms, and on the security of such liens, as will be equitable to themselves and as between themselves and other bondholders and all others concerned in the property and the said mortgage; and whereas, it appears that no foreclosure of said mortgage can be had in time to prevent the forfeitures provided for in said act of the legislature of the state of Minnesota, and that, if the said forfeitures are made, the security of the said mortgage will be, as to the unfinished lines, wholly destroyed; and whereas, the orders hereinafter made are based upon the fundamental consideration and condition that money enough shall be advanced to the receiver fully to build and equip the said extension lines as aforesaid; and whereas, the court has refused to issue debentures as a means of credit in advance of actual construction, or to allow the receiver to incur any indebtedness on his part, as receiver, beyond the money actually advanced:

"Now, the said receiver, out of moneys so to be furnished him, and not otherwise, is hereby authorized to proceed to construct and equip the said extension lines at the lowest possible expense and cost in cash, of which he shall keep an exact and minute account, and make monthly reports to the court; and in no event to exceed the rate of $10,000 per mile for such construction, including necessary sidings, station buildings, water-tanks, etc., and a sufficient equipment for the business of said lines.

"When the said extension lines are fully completed, in such manner as to secure and receive the land grant, and equipped for business, and ready to run, the receiver will be authorized to issue, in such form as the court shall then direct, debentures for the actual sums of money so advanced to him by the said Stephen, Smith, Kittson, and Hill, payable in gold coin of the present standard of weight and fineness established by law, with interest at the rate of eight per cent per annum, which debentures shall include interest at said rate on all sums so advanced to the receiver from the date of such advances, and which debentures shall be a first lien on all the lines of road not now completed, and on all the lands which such completion shall be the means of earning and acquiring, but not a lien on the lines of road already completed, or on the lands already earned, unless the court shall then so order and adjudge. And the right and power are hereby reserved to extend the lien of the said debentures over the lines already completed, and to the lands already earned and acquired and now owned by the company, if to the court it shall appear, upon the completion of the said extension lines to St. Vincent and to Fergus Falls, that such extension of the lien of such debentures is just and equitable.

"Notwithstanding the foregoing order in respect of debentures and the lien thereof, on the completion of the road in running order to St. Vincent, and as far as Alexandria, the court reserves the right to issue

debentures for the cost of such completion, and will issue the same if the said committee of Dutch bondholders shall consent thereto, and if no good reason shall be shown or exist for not then issuing such debentures.

"3. Any bondholder under the $15,000,000 mortgage aforesaid is hereby accorded the right, at any time before the issue of debentures, and, if the court shall think just, at any time before the sale of the property under the decree of foreclosure, to pay his *pro rata* share of the necessary cost of the construction and equipment of the road under this order, and, on placing himself in this regard upon the same footing as the said Stephen, Smith, Kittson, and Hill, shall be entitled to have equal rights with them in respect of said debentures and the lien thereof; and power to make provisions in detail to secure this right is hereby reserved.

"4. It is expressly ordered that the receiver shall contract no debt under this order in excess of money actually received by him. Subject to this provision, the receiver is authorized to purchase all necessary material, to employ all necessary agents and servants, and to make all contracts necessary for the purposes aforesaid; but no contractor under, or other creditor of the receiver, shall have any lien for work or materials furnished the receiver, under any lien law of the state of Minnesota or otherwise.

"5. The said Stephen, Smith, Kittson, and Hill shall jointly and severally execute an instrument approving of this order, and agreeing to furnish all the money herein contemplated, which shall stand as a security to any contractor or laborer under the receiver who shall or may be injured by their failure to comply herewith, and agreeing to procure within sixty days the formal and duly authenticated assent of the said Dutch committee to this order; and the said instrument shall be filed in this cause.

"6. The receiver shall cause all inspections and other proceedings to be had necessary to be taken to secure the acceptance of said roads by the state of Minnesota, as constructed, in compliance with the acts of congress and of said state, and to secure the conveyance to said company of the lands pertaining to such extension lines.

"7. Before this order shall take effect, there shall be filed in this court the duly authenticated assent to its provisions of the new trustees of said $15,000,000 mortgage, and of John S. Kennedy and John S. Barnes, the trustees named in said agreement between said Stephen, Smith, Kittson, and Hill and said Dutch committee; and the approval in writing of the terms hereof by Messrs. John B. Henderson and T. C. Reynolds, the commission appointed by said order of April 18th, 1878.

"8. And it is further ordered, that the said Kennedy and Barnes, the plaintiffs herein and trustees as aforesaid, shall not part with the

possession of said $11,400,000 of bonds, or any of them, without the special order of the court, and that a copy of this order be served on the Mercantile Safe Deposit Company, in the city of New York, and proof of service by some disinterested person shall be filed in this cause.

"9. It is further ordered, that the application of the receiver for leave to sell lands be continued for further consideration; and the power is reserved to modify the provisions of this order, and to make further orders from time to time.

"The clerk is ordered to make a complete record of the petition of the receiver, the order to show cause thereon, the order of April 18th, 1878, and the separate and joint reports of the commissioners named therein (except the map appended to the report of Mr. Reynolds and the copy of the act of the legislature of March 9th, 1878), and of this order.

"Thus made and ordered this 31st day of May, A. D. 1878.

"JOHN F. DILLON, *Judge.*"

Under the authority of this order, the receiver, out of moneys furnished by Mr. George Stephen and others, constructed, prior to December 1st, 1878, one hundred and twenty-five miles of railroad, extending from Melrose to Alexandria, and from Crookston to St. Vincent and the international boundary line at Emerson, at an aggregate cost, as reported, of $1,016,300, thereby giving an unbroken railway connection between St. Paul and the Canadian system of railway in Manitoba. The road thus constructed by the receiver was inspected and accepted by the governor of the state; and the court afterwards, on December 20th, 1878, directed the receiver to issue debentures for the cost thereof.

On April 11th, 1879, a final decree in foreclosure in the suit by the trustees was passed, ordering the sale of the mortgaged premises, including the lands, as an entire property, to the highest bidder, but not for less than $1,500,000, with directions that the proceeds of the sale should be applied, first, to the payment of costs and the services and expenses of the trustees; second, to the payment of the debentures, and next to the payment of the bondholders *pro rata.*

On June 14th, 1879, the entire property was sold under the decree to the St. Paul, Minneapolis, and Manitoba Railway Company, for the sum of $1,600,000.

At the June term, 1879, the sale was confirmed, without opposition from any of the bondholders or others, and out of the proceeds the debentures issued by the court were all called in and paid, and the receiver directed to turn over the property to the purchasers.

On a *petition* of certain bondholders, subsequently filed in the foreclosure suit, Mr. Justice MILLER, at the June term, 1880, delivered the following opinion, orally pronounced:

WETMORE *et al.* v. THE ST. PAUL AND PACIFIC RAILROAD COMPANY.

Right of dissenting bondholders under a railway mortgage to impeach a foreclosure decree and sale, the proper mode of procedure, and what must be shown to justify such relief, considered.

(*Before* MILLER, *Circuit Justice.*)

Setting aside Decree and Sale under a Foreclosure of a Railway Mortgage.

Messrs. Gilman & Clough, for the petitioners.

Messrs. Young, Otis, and others, opposed.

MILLER, *Circuit Justice.* — The case of *Wetmore et al.* v. *The St. Paul and Pacific Railroad Co.*, which has been very fully argued before us, and which we have taken into consideration as thoroughly as we are able at this term, is one of very great importance, considering the sum involved in the controversy. The purpose of the petition is no less than to set aside the sale of a railroad, which is, perhaps, worth $20,000,000 or more —a road which has been reorganized, since the purchase, with a new set of directors, a new set of stockholders, very largely, and, above all, a new set of bondholders. The road was purchased under a decree of this court, the purchase was confirmed, and a new company organized, which has been in possession of the road over a year, and has issued, as I say, some $10,000,000 or $15,000,000 of new bonds, held all over the world; and now original bondholders in the old company, representing a million and a half dollars, come and ask that all these proceedings be set aside, and that we proceed *de novo* to sell the road. These petitioners were not parties to that suit in the sense in which they now seek to be made parties. The first thing that they ask in the present proceeding is that they may be made parties. If they were parties at all, as in some sense they were, and represented by their trustees in the proceedings of foreclosure, they were not parties in such a sense as would enable them to control the litigation or come forward now as parties originally engaged in the litigation; and they therefore seek, very properly, if they are to have any relief in this proceeding, to be made parties in the first instance. The first question that presents itself is whether they can be made parties.

Taking all to be true that they say in their petition, the case stands that during the proceedings of foreclosure these petitioners ought to have been represented, and were legally represented by the trustees, plaintiffs in the foreclosure suit. The foreclosure was manfully resisted by the corporation for three or four years. It was obvious that the mortgage ought to be foreclosed and the road sold, as the interest had not been paid for years. The present applicants state that the road at that time was worth, say, $8,000,000. Fifteen million dollars of bonds were liens upon it, with whatever other claims there may have been against

it, besides the interest coupons; so that the road had a bonded debt of twice the amount these petitioners say it was then worth. It was, therefore, obvious that it was just and right to foreclose the mortgage and sell the road for the payment of those debts.

During this litigation it became apparent to the court that this road had to be sold. They finally entered a decree for the sale. It has been said in argument that that was a consent decree, and therefore was something of an *ex parte* proceeding, but the record does not show any such state of case as that. It shows very clearly that the parties were present, and although there is, in some parts of the record, a preliminary statement that such and such parties were present in court, and consented to the decree, or submitted a decree which they desired to have entered, the record goes on further to state that the court did not enter that decree, but that it took the record and entered a decree upon its own consideration. It was, therefore, a decree on a full consideration by the court—one which met its approval upon an examination of the merits, and it ordered the sale. The sale was had. A part of the original bondholders were, under a special organization according to the laws of Minnesota, purchasers. That did not settle the controversy or the rights of the parties absolutely. The master who made that sale was required to report it into court. He did report it, and the sale was confirmed.

Now, that sale being confirmed, a deed made by the master, the property turned over and delivered to the purchasers, those purchasers having reorganized under another corporate name, doubtless a great deal of the stock that they held passed into the hands of other men—certainly the bonds that they issued upon the strength of that new organization, to the extent of $8,000,000, having passed into the hands of other men—these parties now for the first time come into this court and ask that they may be permitted to upset all this transaction, to do that which they did not seek in the five years of litigation, namely, to be made parties to this suit, and then to be treated in the double aspect of persons who are parties to the suit and having all the rights of parties from the beginning, and also in the aspect of persons who were not parties to the suit, and whose rights have not been foreclosed.

No authority is shown, no precedent is shown—I do not believe any can be shown—for such proceeding. It is so anomalous, so unusual, so much out of the way, that I think it requires express authority in the way of precedent or statute to show that such a thing as that can be done.

The counsel, apparently seeing this difficulty, have made an order accompanying the confirmation proceedings the foundation, to a large extent, of this application—that is, a single sentence at the end of the long order concerning the confirmation. The first part of that confirmation is, "That the said report, the said foreclosure sale, and all proceed-

ings thereon, be and the same are hereby in all things confirmed." There are several orders relating to the distribution of the proceeds, and what the master should do with the money, and so on, and then it winds up: "This order is made by and with the consent and at the request of the trustees, the complainants, and with the consent of the parties defendants shown above; and the right to make any further order is reserved."

The argument in favor of opening this case by these petitioners who are not parties, is that we will permit them to be made parties—that this order is sufficient to open up everything—first, that it is sufficient to go back and open up the original decree; but if not, that it is certainly sufficient to allow the court, upon such representations as they here make, to set aside the order of confirmation, then to set aside the sale, and then to order a resale, or take such steps as may be just to the parties.

The language of that order differs but little from the ordinary language made use of in decrees to the effect "that further orders may be made upon the foot of this decree," and I cannot believe that when it was made it was in the contemplation of the court who was confirming this sale that the "further orders" there spoken of was such an order as would set aside the sale. That was the thing they were passing upon. Who has ever heard of a decree which disposes finally of millions of property—a decree under which the purchasers were to take possession and get a final deed, and under which they would enter upon the management of the property and create new rights by bonds and stock—who ever supposed that such a decree as that was to stand for nothing more than a mere preliminary or interlocutory order, which the court could set aside at any time that in its judgment sufficient reasons for not confirming the sale should be brought to bear? It is much more in conformity with reason, with precedent and common sense, to believe that the "further orders" referred to here are such orders as might be necessary for the distribution of the funds as between the parties, and the payment of bonds which had to come in and which might be disputed as to their ownership—probably for the delivery of the possession (for I do not see anything in this decree which requires the delivery of the possession), probably for the making of a deed (for I do not see anything here about the making of a deed). There are fifty things you can imagine which would be consistent with the confirmation of the sale, and which might yet require further orders of the court. I have not the slightest idea that, after all the consideration and all the trouble that preceded the sale, and all the parties coming in and agreeing to sell, and consenting to it, that the court simply said, "We confirm this sale, subject to the setting aside of the confirmation whenever we think proper." Such a thing would be plainly against the interests of the purchasers, as well as against the interests of the parties. I, there-

fore, think there is nothing whatever in that order which justifies the interference that is asked in this case.

On the whole, then, we are of opinion that there is no principle or precedent which would warrant these petitioners being made parties to this suit, with a view of making such motion in the case.

In the next place, we are of opinion that this order is not to be construed as extending to any such relief as is asked by these petitioners. We, perhaps, ought to stop there. I understand that a bill in chancery, in the nature of an original bill, or a bill of review, has been brought in this court, and demurrer thereto sustained by Judge NELSON, which, of course, is subject to appeal. (*Kropholler* v. *St. Paul, etc. Railroad Co.* 2 Fed. Rep. 302.) I feel bound to say, if these parties are entitled to any relief in regard to this transaction, it is by some such bill as that, and not by a proceeding to go under the foundation of this suit by being made parties to it, and then seeking to controvert matters which might be error in the proceedings. If there has been such fraud practiced upon these parties by their trustees as would justify any relief in connection with that suit, it must be by such a bill as that, whereby they come in and set up their own interest and show how they were cheated and defrauded. But I must say, I think I have a right to say, perhaps it may be of value in further litigation (although I would not be bound by it in the supreme court), that I have not seen such evidences of fraud in this proceeding as to justify the court to set aside this sale.

It seems to me that here was a case of a mutual interest by bondholders and others at hazard, whose purpose and object was to have that road sold to satisfy the bonds. All of them must have desired that the road should be sold to satisfy their debts.

I have already myself decided, on a plea in the original suit concerning the removal of the first trustees and the substitution of others, that that was rightfully done. Of course, I think so now. The road ought to have been sold. It was the duty of the trustees to procure its sale as soon as possible. They did with great energy and perseverance proceed in this court, and finally obtained, after years of litigation, a sale of that property for the purpose of paying these debts. A sale was had; and it is said that one reason why it should be set aside was that it was sold for an inadequate sum. It was sold for a sum above what the court fixed, as chancery practice calls it, as an "up-set price."

Of course, the court, in fixing an up-set price, intended to say that it was better that it should sell at that price than not to sell at all, and the court had taken the necessary means to get all the information on the subject possible, as the case stood at that time. It is wrong to suppose that the same court will now set aside the sale which brings a million and a half dollars, because of the objection that now, in the light of a year or two after that, in the improved circumstances and the prosperous times, in the value attaching to that road growing out of the

connections newly made, we are now to consider the thing as of the present time in relation to its value at the time the sale was made. This is one of those constant every-day events of people who have let things slip out of their hands coming back afterwards to endeavor to secure the value which they failed to recognize or secure at the time.

Nothing hindered these bondholders from bidding. It is said that there was a million and a half dollars among them. They could have bid as well as the other bondholders. The trustees did not feel disposed to fight them; they left them to protect themselves.

I must say, also, in regard to the trustees, that I do not see, although by the decree they had the power, and perhaps a conditional instruction that they should purchase that property if they thought it was selling for a totally inadequate price—but I cannot say that they did not exercise their best judgment about that when they let it go. We do know that there were large expenses to be paid; that there was a large sum of money in cash to be paid before it could be bought by the trustees and paid for in the bonds of the corporation. We know that there were a million dollars of debentures and other interests that had to be provided for before the road could be purchased by the bonds, and we do not know of any adequate means that the trustees had to raise the cash and the amount of these debentures.

I must say, in regard to the argument urged here more than once by Mr. Gilman, that these trustees should have sold the land for that purpose, does not strike me as being an argument of very great weight. They could not have sold land in time to raise that money in any ordinary mode, in any satisfactory mode, in any mode that would not have been liable to greater objections, or as great, as to let the road be bought in by a majority of the bondholders. I, myself, do not see any fraud committed by these trustees.

The great objection, however, is that these bondholders commenced proceedings long ago, under the foreclosure proceedings, to organize themselves into a body of men by a committee for the purpose of buying the road. In regard to that, it is to be said that they excluded nobody—none of the bondholders—from coming in on the same terms as themselves. They invited every one to come in with them. These petitioners, representing a million and a half, who now hold these bonds, stood out and declined to come into that arrangement, and took no steps to protect themselves or the property. What right have they, when these parties spent money, time, and trouble to have this road sold, to claim all the advantages which diligence and labor, and money expended (and especially the money for these debentures)—what right have they to come in now and say, "We avail ourselves of your labor, money, and time, for the simple reason that you undertook to get this road sold for the purpose of paying yourselves as well as us?"

Because these men co-operated and put themselves into condition to buy the road, it does not seem to me that they were therefore acting in any fraudulent manner. They deprived these petitioners of none of their rights. They were at liberty to join the syndicate, as it was called; they were at liberty to bid; they were at liberty to come in and make themselves parties. They did nothing of the kind. Were these bondholders who purchased the road to be put into the condition of a single man who owned twelve millions out of fifteen millions of bonds, I can see no reason why they should not take steps to have the road sold and buy the road as cheap as they could get it, provided they cheated or hindered nobody in the matter.

This branch of the subject was not necessary to be decided here, and the parties may take an appeal from Judge NELSON'S decision. I only make these remarks for the consideration of counsel.

The present petition is overruled.

PETITION OVERRULED.

REPORTS OF CASES DETERMINED

IN THE

Circuit Court of the United States

FOR THE

DISTRICT OF IOWA.

TIMOTHY KELLOGG *v.* MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

The defendant was the owner of an elevator built on the bank of the Mississippi river, and also of a steamboat used in transferring cars and barges to and from it. The steamboat had no spark-arrester, and the exhausted steam was allowed to escape through its chimney. The plaintiff was the owner of a mill and a lumber yard, the former five hundred and twenty-eight and the latter three hundred and eighty-eight feet from the elevator, and the space between these and the elevator was vacant; the elevator being unused, its spouts left open, and without a watchman; the steamboat, being in the necessary course of its occupation, moved alongside the elevator, and the weather being very dry, and the wind high and blowing in the direction of the plaintiff's mill and lumber, the elevator, by reason of sparks communicated from the chimney of the steamboat (as the evidence tended to show), caught fire, and from it fire was communicated to the plaintiff's mill and lumber, so that these latter were consumed. Upon these facts it is *held:* (1) That the defendant was not liable in any event, unless the fire was communicated to the elevator through the defendant's negligence, or the negligence of its servants, in the construction and use of the boat; (2) that the defendant would not be liable unless the burning of the elevator was the *proximate*, and not merely the *remote*, cause of the burning of the mill and lumber; (3) that whether the burning of the elevator was

the proximate or the remote cause of the burning of the mill and lumber was a question of fact for the jury; (4) that the jury were therefore to determine whether the burning of the mill and lumber was the result *naturally and reasonably to be expected* from the burning of the elevator, and whether the burning of the elevator was the result of sparks communicated from the steamer; (5) that there was nothing in the fact of the steam being emitted through the chimney of the steamboat from which the jury should infer negligence; (6) that the leaving of the elevator unused, without a watchman, and with its spouts open, did not constitute such negligence as would make the defendant responsible to the plaintiff; (7) that the question whether the defendant was guilty of negligence, in failing to make use of *spark-arresters* on its steamboat, was a question of fact for the jury; (8) that the true test of negligence in this and other cases is, what would an ordinarily prudent man have done under the precise circumstances?

(*Before* MILLER and DILLON, JJ.)

Negligence Causing Fire.—Remote and Proximate Cause.—Construction of Steam Engine as Respects Damages Caused by Sparks.—Duty of Steamboats as Respects Spark-Arresters.—Duty of Guarding Elevators.

IT appears from the pleadings and the undisputed evidence in the cause that the plaintiff, on the 3d day of October, 1871, was in the possession of a saw-mill on the bank of the Mississippi river, situate on certain lots in an addition to the town of McGregor, in Iowa, upon which there was a large quantity of lumber. At the same time the defendant was the owner of a large grain elevator building, also situate on the bank of the river, five hundred and twenty-eight feet above the mill of the plaintiff. The intervening property was vacant or unoccupied. This elevator was built before the plaintiff's mill, and was constructed of pine, and was from one hundred to one hundred and twenty feet in height. It seems to have been built after the usual model of elevators, and had spouts or openings on the east or river side thereof for the purpose of discharging grain into boats or barges. The lumber on the plaintiff's premises was distant from the elevator three hundred and eighty-eight feet.

At the date above named, the defendant was also the owner of a steamboat called the "Jennie Brown," which was employed by it in transferring cars and barges back and forth between the end of its road at North McGregor, on the Iowa side of the river, and Prairie du Chien, on the Wisconsin side.

On this 3d day of October, 1871, the elevator caught fire and was entirely consumed, and the fire therefrom extended to and also entirely consumed the plaintiff's lumber and his mill building and machinery. There was, at the time, an unusually high wind blowing from the elevator in the direction of the plaintiff's lumber and mill. The evidence tended to show that sparks and burning brands were carried directly from the elevator to the lumber and mill, and that the trees on the bluffs, six hundred feet distant from the elevator, were scorched and killed by the flames and heat from the elevator.

The plaintiff brings this action against the railroad company to recover the value of the mill, machinery, lumber, and property thus consumed. The ground of his action is the defendant's alleged negligence, which the plaintiff claims was the cause of his loss, and was so directly the cause of it as to involve an actionable liability on the part of the defendant. There are several specific grounds of complaint in the petition against the defendant, in connection with this fire:

1. It is claimed that the defendant is at fault because it negligently omitted to provide the Jennie Brown with spark-arresters.

2. Because the exhausted steam was admitted into the smoke-stack, thereby intensifying the force of the draught, and that by reason thereof, and by reason of the absence of spark-arresters, the boat emitted or threw off large quantities of sparks and coals.

3. That the spouts or openings in the elevator on the river side were carelessly left open.

4. That the elevator at the time was unoccupied, and negligently left without a watchman or other person to look out for or prevent fire.

The substantial charge in the petition is that in one of her trips the defendant "negligently permitted the steamboat to approach and lie alongside of, or in close proximity to, said grain elevator, and negligently allowed and caused long and strong draughts of escaped or exhausted steam to pass and rush into the smoke-stack of the boat, whereby large quantities of cinders, sparks, or coals of fire were forced up through and emitted from the smoke-stack against the elevator and openings in it, in consequence of which, and of the negligence of the defendant in not providing the proper and necessary spark-arresters, and of their negligence in not keeping some person in charge thereof, and of their negligence in not keeping the openings in said elevator closed, the same took fire from said sparks, and from thence the fire extended to and burned the plaintiff's mill and property."

The defendant asked the court to instruct the jury that if "they believed from the evidence that the sparks from the Jennie Brown set fire to the elevator through the negligence of the defendant, and the distance from the elevator to the nearest lumber pile was three hundred and eighty-eight feet, and to the mill five hundred and twenty-eight, then the proximate cause of the burning of the mill and lumber was not the burning of the elevator, and the injury to the plaintiff is too remote from the negligence to afford a ground for recovery." This was refused.

Beach & Murdock, for the plaintiff.

Cary & Updegraff, for the defendant.

MILLER, *Circuit Justice*, charged the jury in substance as follows:

"These three questions you are called upon to determine:

"*1st.* Whether the elevator was burned by sparks from the Jennie Brown.

"*2d.* If it was so burned, was it in consequence of the negligence of the officers or men in charge of the Jennie Brown?

"*3d.* Whether the burning of the mill and lumber was the natural and probable result of the burning of the elevator.

"As to the first — whether or not the elevator caught fire from the sparks of the Jennie Brown — you can determine this as well as I can, and the decision of that question I leave with you without comment. In considering the other two propositions, I will commence with the last first. Supposing, for the present, that the elevator was burned down through the carelessness of the defendant, was the burning of the mill and lumber so connected with the burning of the elevator that the defendant would be responsible for it? On that point I have been asked by counsel to instruct, as a matter of law, that, by reason of the space intervening between the elevator and the mill of plaintiff, the burning of the elevator would not make them responsible. The authorities are in conflict upon that subject — that is, upon what is called *remote* consequences. Now, in the case before us, it is said that, while the burning of the elevator was the direct consequence of the sparks from the Jennie Brown, the burning of the mill and lumber was the remote consequence of the negligence of the defendant. I am not prepared to say this. I do not believe it is the duty of the court to take that question away from the jury, and I leave it with you, as was done at the former trial, to determine whether, under all the circumstances of the case — with the wind blowing; the inflammable character of the elevator; the combustible material of which it was composed; and, on the other hand, the distance between the elevator and the mill and lumber, and from all the evidence and circumstances before you — whether the burning of the mill and the lumber by the fire from the elevator was a consequence usually and naturally to be expected; *whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator, and whether the burning of the elevator* was the result of the sparks from the Jennie Brown. If you find that the officers of the boat were not guilty of negligence or carelessness, then the defendant is not liable to the plaintiff; but if you find the contrary to be true, then it may be responsible for the loss of the mill and the lumber. The main point upon which this case turns, in my judgment, is whether the parties

who had charge of that boat were guilty of such negligence within the meaning of the law as would make them liable for causing fire to the mill and lumber of the plaintiff. If you find that the elevator was set on fire by the sparks from the boat (and I will so suppose for the purpose of illustration), then was the conduct of the parties in charge of the boat at the time of the fire characterized by such want of care, or want of skill in her management, as to make the owners of the boat (this railroad company) liable for the burning? In the first place, I observe that the railroad company in this case stands precisely in the same position as if the boat was owned by an individual. There is no additional responsibility attaching because it was a railroad company, nor are they any less responsible because of that fact.

"Two or three circumstances, apart from the transactions of that day, have been proved to you as showing, or tending to show, negligence or carelessness on the part of the officers in charge of the boat on the day in question. The first of these to which I call your attention is the fact of the steam of the boat being emitted through the *smoke-stack*. As Judge DILLON instructed the jury before, so I instruct you now. There is nothing to presume any negligence on the part of the railroad company in that regard. It is one of the usual, if not necessary, means for increasing the locomotive power of the vessel — for increasing the amount of steam. It is almost universal, and, I presume, necessary, and no charge of negligence can be made against the owners of the boat because they permitted the steam to be emitted through the smoke-stack.

"Another ground of carelessness alleged against the defendant, not connected with the boat, is that the elevator (which was also their property) was not being used, and that it was a season of the year when it was uncommonly dry; that it was made of inflammable material, was left without a watchman, and that it was left with certain openings — places where the grain was taken in — called spouts; that these spouts for the discharge of grain were left open. Supposing this to be so, there is no negligence in this respect upon which the defendant is responsible to

the plaintiff. Because they were not using the elevator at the time is no reason why they should be called upon to keep a watchman, nor is the fact that these spouts are left open a ground of negligence.

"A more interesting question on the subject of negligence grows out of the question discussed here in regard to the use of the *spark-arrester*, which is an apparatus on the chimney to arrest the sparks. On that subject I hesitated a good while whether I should have to say to you that there was no negligence in that regard — that is to say, that the owners of the boat were not bound to use these spark-extinguishers or arresters. But, upon further reflection, I do not think, upon the evidence, I am authorized to declare, as a matter of law, that that is so; but I must leave you to say, from the testimony, whether in this respect the owners of the boat were guilty of negligence. Upon this subject it is proper for me to remark that the true test of care and diligence on one side, and of negligence, which is the absence of diligence, on the other — a test which juries should apply, and which the law applies — is, what would an ordinarily prudent man have done under the precise circumstances which are here presented to you? The best test you can bring to bear is, what would an ordinarily prudent and careful man, who owned a boat like this, or any other boat like it, have done in regard to employing the use of a spark-arrester or spark-extinguisher? If prudent and careful men do not think it necessary, and have found it impracticable to use them, the defendant is not bound to use them. That is one test. Another consideration upon this subject is that in this day and time, with the elements of transportation used in commercial transactions and with the great bulk of material transported to and from this country, from the east to the west and from the west to the east, the use of steam power has become not only necessary but indispensable to the interests of the whole country. Steam is now used as the old Conestoga wagon, with six horses, used to be. The expense of using steam power is taxed upon the products of the country transported. Motive power, bringing it down to the last prin-

ciple, is the generation of steam, which is the main item of expense in transportation. Therefore, you are to consider how far the interests of the public require those using this great power to be restricted, and how far the good of the people requires those making use of it to adopt means of safety and protection. If steamboats must adopt various apparatus, thereby increasing their expenses, they must charge them upon the products of the country transported by them. On the other hand, if they can dispense with such things without too great danger, it is to the interest of the people for them to do it. But they should adopt such means as may be useful for the protection of property and persons. Under all the circumstances, you are to consider what has been found to be generally used by prudent and careful men in the management of vessels and steam power; the general usage; the experiments made, and the opinions of those who have used the spark-extinguisher; and you are to say, under all the circumstances, whether there was any duty imposed upon the defendant to have a spark-extinguisher on its vessel at the time this fire occurred.

"Now, gentlemen, you come to the main question, whether, in point of fact, in the management of that vessel on that day, and under the circumstances, there was any negligence on the part of the officers having charge of the boat? Upon that subject I do not know of any test better than that I have already given you. If you find the defendant was using such care as ordinarily prudent men would have used under like circumstances, then there would be no negligence on their part. You are to consider all the evidence upon the subject, and also the entire situation; the violence of the wind; the inflammable material of the elevator; the nearness of the vessel to the elevator. You are to remember that these men had a right to go there; that it was one of their landing places; that they could not go directly up to their other landing place because another vessel was there. You are then to consider whether, in their attempt to get away from there, they increased the fire in their engines so that the sparks were unusually dangerous; whether it was prudent in them to

use as much power and force as they did, or whether they used any force; whether the steam was got up in such a way that prudent men would have said: 'We will stop this rather than go on; the danger is too great.' You can consider that, or you can consider, on the other hand, whether they were doing only what was necessary to get off their barge. All this is for your determination, and there is no other rule but this simple one, that, while they had a right to use their vessel to get the barge away, to get up to the proper landing place, or up to the island, yet they were bound to have a due regard to the risk, to the danger that they might possibly set fire to the elevator and burn it, and not only burn the elevator, but other men's property. If the elevator was burned on account of their carelessness and negligence, then they are responsible for the burning of this man's property as well as of the elevator, if you believe they were so connected as I have already explained. If they used due diligence and due care, then they are not responsible, although the sparks from the boat may have set fire to the elevator, and from that fire the mill and lumber were burned.

"Steam is a dangerous element; fire is a dangerous element; but people must use steam, and, although defendants had a right to use this vessel there, they were required to exercise due care and prudence, such as an ordinarily prudent and sensible man would have exercised. Was there anything to put them upon their guard? Did they exercise due care and prudence, such as a careful and prudent man would have done? This is the gist of your inquiry."

The jury found the following verdict:

"*1st.* We, the jury, find that the elevator was burned from sparks emitted from the steamer Jennie Brown.

"*2d.* That such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time.

"*3d.* That the burning of the mill and lumber was the unavoidable consequence of burning of said elevator.

"We, the jury, therefore find for the plaintiff, and assess the damages at twelve thousand five hundred and two dollars and fifty cents ($12,502.50)."

And the court rendered

JUDGMENT UPON THE VERDICT.

NOTE.—The subject of proximate and remote causes is ably treated, and the principal cases cited and learnedly commented on, in Wharton on Negligence, section 85 *et seq.* The author refers to the principal case (sections 154, 874). The learned author is mistaken in the statement (section 154) that "the defendant was clearly guilty of negligence in not having spark-arresters to the smoke-pipe," since it was quite clearly established that spark-arresters had as yet proved unsuccessful and impracticable on boats engaged in navigating the Mississippi river.

The case of the *Toledo, Wabash, and Western Railway Co.* v. *Muthersbaugh* (7 Chicago Legal News, 131, s. c. 71 Ill. 572) was this: Sparks from a locomotive set fire to a warehouse standing near the railway track and destroyed it. A stable stood one hundred and one rods from the warehouse, and there were no intervening buildings. There being a high wind blowing at the time, from the direction of the burning warehouse, fire was communicated to the stable, and it was consumed: *Held*, that the owner of the stable could not recover damages against the railroad company. The burning of the warehouse was not the proximate but the remote cause of the burning of the stable. The court cite and follow *Fent* v. *The Railroad Co.* (59 Ill. 349). See also *Metallic Compression Co.* v. *Fitchburg Railroad Co.* (1 Cent. Law Jour. 212).

Liability of railway company for damages to property by fire caused by the company's negligence, see *Grand Trunk Railway Co.* v. *Richardson* (91 U. S. 454).

The judgment of the circuit court in *Kellogg* v. *Milwaukee and St. Paul Railway Co.* was subsequently affirmed by the supreme court (94 U. S. 469).

CHARLES B. WAITE *v.* J. D. TRIBLECOCK.

Judgment in an undefended action of replevin for a note in favor of the maker, which action was brought upon the ground that the note had been obtained by fraud, and in which only the banker having the note for the collection of interest thereon was made a defendant, was held, under the circumstances, not to bar the owner of the note (an indorsee thereof for value before maturity) from maintaining an action thereon against the maker.

(*Before* DILLON and LOVE, JJ.)

Replevin for Promissory Note. — Effect of Judgment. — Res Judicata.

THE defendant gave his negotiable note, secured by mortgage, for twenty per cent of stock subscribed in the Great Western Insurance Company, of Chicago — that being the *cash* payment required by the company. This note and mortgage were sold and assigned by the company to the complainant, a citizen of Illinois, before due, and, as the court decided, for value. The note was sent by the complainant to one Ellis, a banker in Iowa, for collection of interest. While in the possession of the banker for that purpose, the defendant brought an action of replevin in the state court against the banker as defendant, for the note, and, on the writ of replevin, obtained possession thereof. The ground of the replevin action was that, as the note had been obtained by fraud, the maker was entitled to its possession.

The present complainant did not appear to the replevin action, nor was he made, nor did he make, himself a party to it. Judgment was given in the replevin action for the plaintiff therein. In the present bill to foreclose the mortgage, the defendant pleaded specially the judgment in the replevin action as a conclusive bar to the complainant's right to foreclose the mortgage.

Clark & Harbert, for the complainant.

H. H. Trimble, for the defendant.

DILLON, *Circuit Judge*, in disposing of this question, said, in substance:

The special defence, that the plaintiff is concluded by the judgment in replevin in the state court, is not well founded in law. The pleadings in that case go upon the idea that the Great Western Insurance Company was the owner of the notes, and that the defendant therein, Ellis, was the agent of the company. The findings in the judgment of the state court as to Waite, the present complainant, are outside of the issues and void. Waite was the owner of the note, and the indorsement on the note so disclosed, and, if he was to be bound, should have been made a party to the replevin action. Besides, his claim of ownership to the notes was known to the plaintiff in replevin long before the cause was tried, and he refused to make Waite a party.

Ellis was in the interest of the plaintiff in that suit, and no defence in fact was made, and there was no trial on the merits as respects Waite, the real owner. Jones was employed as an attorney in the replevin suit by the insurance company, and not by Waite.

Whether the validity of the note could have been tried in an action of replevin in the manner sought, had the real owner been a party, need not be decided. The action of replevin is not one *in rem*, and to give jurisdiction over the person he must be a party. Ellis sustained no such relation to the note or to Waite as to make the judgment against him, which he did not defend for Waite, conclusive on him. It is *res inter alios acta* as to Waite.

LOVE, J., concurs.

DECREE FOR PLAINTIFF.

NOTE.—An appeal was prayed and allowed, and afterwards the decree was affirmed.

MARTHA BAYLISS, Devisee and Administratrix of the Estate of Samuel S. Bayliss, deceased, *v.* THE BOARD OF SUPERVISORS OF POTTAWATTAMIE COUNTY — the City of Council Bluffs, Intervenor.

The public square in the city of Council Bluffs held to be effectually dedicated to the public by force of the platting and acknowledgment thereof, and acts *in pais* by the dedicator.

(*Before* DILLON, *Circuit Judge.*)

Dedication of Public Square. — Iowa Statute. — Estoppel.

THIS suit involves the right of the plaintiff and the city of Council Bluffs (since the county sets up no claim in its own behalf or as the representative of the public) to what is called the *public square* in that city. The plaintiff is entitled to it as against the city, unless her husband, in his lifetime, made a valid dedication thereof to the public.

On September 26th, 1853 (while the title to the forty acres afterwards laid off as Bayliss' addition to Council Bluffs was in the United States), Mr. Bayliss, the occupant, caused a plat to be made of that forty acres, subdividing it into fifteen blocks, with streets and alleys in the usual form, near the center of which is an open, unnumbered block, not subdivided into lots, four hundred feet square, surrounded by streets; on the middle of which block are the letters "P. S." Indorsed on the plat is the following certificate of the surveyor, and the following certificates of acknowledgments:

"I, A. D. Jones, *city surveyor*, hereby certify that all the streets, alleys, and *public square* lie as above represented on the above plat of Bayliss' addition to the city of Council Bluffs, and that the lots, streets, and alleys are described as follows: All the lots in blocks eight, nine, and fifteen are fifty feet in width by one hundred and two feet in length. * * * The *public square* is four hundred feet square. * * *

"Surveyed and platted by A. D. Jones, April 13th, 1853.

"Given under my hand this 13th day of June, 1853.

"A. D. JONES,
"*City Surveyor of Council Bluffs.*"

"STATE OF IOWA, *Pottawattamie County:*

"Know all men by these presents, that I, Samuel S. Bayliss, *proprietor* of Bayliss' addition to Council Bluffs, do hereby declare and acknowledge the above plat and *surveyor's certificate* of the survey of said addition, as surveyed and platted by A. D. Jones, June 12th, 1853, to be correct; and I further hereby give, grant, and donate all the *streets and alleys* as represented on said plat to the public as highways, and for general use and convenience.

"Given under my hand this 13th day of July, 1853.

"SAMUEL S. BAYLISS."

"STATE OF IOWA, *Pottawattamie County:*

"Before me, A. D. Jones, notary public in and for said county, appeared the above named Samuel S. Bayliss, personally known to me to be the identical person who subscribed the above conveyance, and as *proprietor* of said addition, and as grantor of said deed, and acknowledged the signing of said instrument to be his voluntary act and deed.

"Given under my hand and official seal, the 14th day of July, 1853.

"A. D. JONES,

[SEAL.] "*Notary Public.*"

"STATE OF IOWA, *Pottawattamie County:*

"I, Frank Street, judge of said county, do hereby certify that on this day personally appeared before me Samuel S. Bayliss, and acknowledged that the description of the land as shown by the map or plat hereto attached is with his free consent, and in accordance with his desire.

"Given under my hand and the seal of said county, this 26th day of September, A. D. 1853.

"FRANK STREET,

[SEAL.] "*County Judge.*"

"*To the Recorder of Pottawattamie County, Iowa:*

"SIR:—Having, upon examination, become fully satisfied all the requirements of the law have been complied with in regard

to the survey and plat of a town as shown by the map herewith attached, you are therefore authorized to record the same and the annexed certificate, in accordance with the law in such cases.

"FRANK STREET,

"September 26th, 1853. *County Judge.*"

This plat, with all of the said certificates, was duly recorded September 26th, 1853.

Another plat was also made and recorded June 1st, 1854, on which the streets and the square in question were represented in the same manner. On this plat the following was indorsed:

"Know all men by these presents, that all the streets, and *public square*, and alleys, and lots, are of width and length as represented on the within plat by figures; all lots are one hundred and ninety-two feet in length by fifty feet in width, except where the length and width are noted on the respective lines. The lots in blocks eight, nine, and fifteen are one hundred and two feet in length. The variation of the needle, eleven degrees eleven minutes; course of lines north and south, eleven degrees; the upper regular lines are at right angles; and the irregular lines as represented on the plat as surveyed by A. D. Jones.

"In witness whereof, I have hereunto set my hand this —— day of May, 1854.

"Know all men by these presents, that I donate all the *streets and alleys* to the public for common use and benefit as highways.

"In testimony whereof, we have hereunto set our hands this —— day of May, 1854.

"(Signed,) SAMUEL S. BAYLISS."

"STATE OF IOWA, *Pottawattamie County:*

"On the 1st day of June, 1854, personally appeared before me, the undersigned, a notary public within and for the state and county aforesaid, Samuel S. Bayliss, who is personally known to me to be the identical person who executed the above

instrument or donation, and acknowledged the same to be his voluntary act and deed for the purposes therein expressed.

"Witness my hand and notarial seal, this 1st day of June, A. D. 1854. "JEFFERSON P. CASADY,

[SEAL.] "*Notary Public.*"

Under the act of congress entitled "An act for the benefit of citizens and occupants of Council Bluffs, in Iowa," approved April 6th, 1854, Franklin Street, as county judge, entered this forty acres in trust. (See chapter 88, Laws of Iowa, 1853, entitled "An act regulating the disposal of lands purchased in trust for town sites," approved January 22d, 1853.)

In disposing of this land, the above plats of Bayliss were recognized, and the square in question treated as *public*, and the occupants of lots were charged for their proportion of the purchase money paid to the United States on that basis. Bayliss was admitted to be the *cestui que trust*, and deeds were made to him and to his grantees, from time to time, by the county judge, for the lots in the addition. Bayliss sold and conveyed lots to purchasers according to the recorded plats.

Mr. Ballard testifies, in substance: "In the fall of 1853 or spring of 1854, Bayliss wanted to sell me lots in his addition on the public square, and then known as the public square. He urged them as desirable for residence lots because of their fronting on the *public square*. He claimed to own lots he was showing me, and spoke of their being on the public square. I have no recollection of his claiming any individual interests in the square itself."

Mr. Rice testifies, in substance: "I knew Samuel S. Bayliss from 1853 to the date of his death. Am acquainted with the square in controversy, and have been since Bayliss' addition was laid out, in the fall of 1853. Bayliss *showed me his plat* on two occasions and took me on the ground several times, with a view to purchase a church lot on east side of the square; and afterwards he took me on the south and west sides of the square. On these occasions we conversed in relation to the square and the

lots contiguous to it. He showed me lot four in block nine, with a view to my purchasing this for a church site. He represented it as fronting on the public square, and more desirable on that account. He pointed out the block bounded by Pearl, Willow, Court, and Center streets as the public square."

Mr. Lewis testifies that, in 1853, Bayliss showed him the plat of his addition with the square in question shown thereon; that witness purchased of Bayliss lots on the square, Bayliss pointing out the square on the plat and speaking of the advantages of lots near the square, and of their value being greater than elsewhere, and he charged more for that reason for lots on the square.

Cumulative evidence to the same general effect was also given by Mr. McBride, Mr. Dennis, Mr. Officer, Mr. John T. Baldwin, and Mr. W. H. M. Pusey.

The records of the city council show that, in 1857, the city improved the streets around the square, and in the same year the city council adopted a resolution providing for sealed proposals to fence the public square, in Bayliss' addition, provided the citizens around the square shall furnish the money and take city orders at par for the same; and many subsequent resolutions for the improvement of the square and regulating its uses, both before and after the present suit was brought, which was on July 13th, 1866.

In March, 1853, Bayliss entered into an agreement with the county judge of the county, by which he "agreed to deed to the county the ground for a public square in and for said county, as follows" [here describing the ground now in controversy]. "Also another piece of ground as a site for the court-house for said county" [here describing two lots fronting on the square]. And also to make a certain donation to aid in the erection of the court-house. The county judge thereupon (March 11th, 1853) ordered as follows:

"Therefore, ordered, that if the said materials shall be furnished and said lots donated according to the tenor and intent of the aforesaid bonds and instruments of agreement, the said square shall be, in that case, hereby located and established as

the public square for said *county*, and the last described lot, in that case, be established as the site for the court-house in and for said county.

"T. BURDICK, *County Judge.*"

In 1866, the county definitely determined to build the court-house in another part of the city, and soon afterwards this suit was brought. But meanwhile, July 12th, 1855, on Bayliss' demand, the county judge reconveyed the court-house lots on the square to Bayliss, with this provision: "To hold the same in trust for the county of Pottawattamie until the same shall be needed to build a court-house on, or until a court-house shall be built upon the public square adjoining, and if the court-house should neither be built on said public square nor lot, then the lot becomes, absolutely, the property of the said Bayliss; and I, as such trustee, warrant the title against the claims of all persons whomsoever.

"Signed, July 12th, 1855.

"FRANKLIN STREET, *County Judge.*"

Judge Street testified that "Bayliss never, at any time, demanded of me a conveyance of the public square."

There are many minor facts in evidence, but the foregoing sufficiently show the essential features of the case.

Clinton, Hart, & Brewer, for the complainant.

L. W. Ross, solicitor for intervenor, and of counsel for the defendants.

DILLON, *Circuit Judge.* — If the county were the only adverse claimant to the plaintiff, and were insisting that this square had been effectually dedicated to it, it may, for the purposes of this case, be conceded that the plaintiff would be entitled to the relief sought. But after the transaction with the county judge, in 1853, Mr. Bayliss made two separate plats of the property, on which this square was indicated as open and unnumbered, with the initials "P. S." therein, and containing words referring

to it as a public square. It would seem, from a reference to his acknowledgment of July 14th, 1853, and to the latter part of the grant to the public of May, 1854, acknowledged June 1st, 1854, that Mr. Bayliss omitted all reference to the *square*. But in the surveyor's certificate indorsed on this plat, the surveyor twice refers to the square in question as a public square, and Mr. Bayliss "declares and acknowledges the above plat and *surveyor's certificate* to be correct;" and on September 26th, 1853, he acknowledged the plat in conformity with the statute on that subject. In the writing indorsed on the plat of 1854, the ground in question is referred to as a public square. This makes an effectual dedication under the statute—certainly when it is accepted by the city. The proofs sufficiently show such acceptance by appropriations of money for its improvement and by the exercise of legislative and municipal power over it as a public square. If Mr. Bayliss intended to exclude this square from the ground dedicated to the public, he failed to accomplish his intention.

A purchaser consulting the recorded plats, with the acknowledgments and certificates, would be justified in concluding (as several intelligent witnesses state they did in fact) that the square was dedicated to the public.

Whether we look at the recorded plats, with their certificates and acknowledgments, or to the extrinsic evidence as to Mr. Bayliss' repeated statements to persons proposing to purchase lots, that this was a public square, and that not only the immediate purchasers, but the public, have acted upon these plats and these statements, it is clear that Mr. Bayliss and his representatives are brought within the principle of equitable estoppel which so often applies to this class of cases. (*Cincinnati* v. *White*, 6 Pet. 431; Dillon on Municipal Corporations, secs. 493, 494.) It is claimed, however, that, Mr. Bayliss being dead, his statements and declarations are not competent evidence against the plaintiff (Code of Iowa of 1873, sec. 3639). I do not stop to examine or determine the point, for, if well taken, it would not exclude evidence of *acts* of his testified to by many witnesses,

such as that he charged and received more for lots fronting on the square (simply for the reason that it was public) than for lots elsewhere, which, in every other respect, were worth as much, and the other significant fact, that, although he demanded and received a deed for the court-house lots, he made no such demand in respect of the square.

The city was incorporated before either of the plats was recorded. The statute declares that "the acknowledgment and recording of such plat is equivalent to a *deed in fee-simple* of such portion of the land as is therein set apart for *public use*, or is dedicated to charitable, religious, or educational purposes." The city is the representative of the public rights in this square.

A decree will be entered dismissing the plaintiff's bill against the county, and also against the city, which, by intervention, also became a party to the suit.

DECREE ACCORDINGLY.

A. C. CARPENTER *v.* BUENA VISTA COUNTY.

1. Under the legislation of Iowa, counties have the power to issue negotiable securities for borrowed money to aid in specified public improvements therein, or to meet extraordinary expenditures, if previously authorized by a vote of the people, but not otherwise.
2. Bonds, under the seal and signed by the proper officers of the county, payable to bearer, and containing a recital that they are issued pursuant to a vote of the people of the county, are presumptively valid, although the particular purpose for which the bonds were voted is not therein stated.

(*Before* DILLON, *Circuit Judge.*)

County Bonds. — Authority to Issue. — Recitals. — Legislation of Iowa. — Popular Vote. — Defences.

ON demurrer to the petition. The action is brought upon three instruments, substantially as follows: "Bond due in one year. Know all men, etc., that there is due from the county of

Buena Vista to Lansing W. Lewis, or bearer, $1,000, with interest at the rate of ten per cent per annum, payable on, etc., on surrender of annexed coupons. For the performance of all which the faith of the said county of Buena Vista is pledged. Said bond is issued in accordance with a law of the state of Iowa, and authorized by a vote of the commonwealth of the county of Buena Vista, submitted at the general election held October 9th, 1866, all the requirements of law having been complied with, and a special tax authorized by said vote to be levied from year to year for the payment of principal and interest of said bonds." Dated the 16th day of October, 1866, and alleged to be sealed with the seal of the county, signed by the president of the board of supervisors, and attested by the clerk of the county. The other bonds are the same, except one is payable in four and the other in seven years from the date thereof.

The petition alleges that the plaintiff became the owner and holder of these bonds for value and before they became due, and alleges that the county made, executed, and delivered the bonds to the said Lewis, the payee, in accordance with the recital in the bonds, setting forth that recital *in hæc verba, but not otherwise alleging for what purpose or consideration the same were executed.* A copy of the bonds and coupons in suit is annexed to the petition as part thereof.

The county demurs to the petition on the ground that it does not appear that the officers of said county were authorized to issue the bonds, or that they were issued for a purpose authorized by law.

Under the legislation of the state, "the county judge (and since 1860 the county board of supervisors) may submit to the people of the county, at any general election, or at a special one called for that purpose, the question whether money may be borrowed to aid in the erection of public buildings; whether the county will construct or aid to construct any road or bridge which may call for extraordinary expenditure." (Code of 1851, sec. 114; Revision of 1860, sec. 250.) The next section prescribes the mode of submission. The next section is as follows:

"SEC. 252 (116). When a question so submitted involves the borrowing or expenditure of money, the proposition of the question must be accompanied by a provision to levy a tax for the payment thereof, in addition to the usual taxes, and no vote adopting the question proposed will be of effect unless it adopt the tax also." By another section, the county judge (and since 1860 the board of supervisors), on being satisfied that the vote has been adopted, is to enter the proposition and result of the vote of record and to cause notice of its adoption to be published; "and from the time of entering the result of the vote in relation to borrowing or expending money, the vote and the entry thereof in the county records shall have the force and effect of an act of the general assembly." (Revision, sec. 255—119.) Money thus raised constitutes a distinct fund. (*Ib.* sec. 260.)

John D. Rivers, for the plaintiff.

Galusha Parsons, for the county.

DILLON, *Circuit Judge.*—The bonds are negotiable in form, and purport to be under the seal of the county, and to be signed by the proper county officials. They are alleged to have been executed and delivered by the defendant, and on the demurrer it must be assumed that they are signed by the proper officers of the county, and are under its official seal. The substantial question presented by the demurrer is, whether, in an action against a county in Iowa, on bonds like those in suit, it is essential that the petition should affirmatively show, either by averment or by the recital in the instrument (which is made part of the petition), that it was issued for a specific purpose authorized by the laws of the state of Iowa, such as to construct public buildings, roads, or bridges. The question is material, because if it be necessary for the plaintiff to allege this, it would be necessary for him to prove it, and the bonds in suit would not, when produced on trial, make out a *prima facie* case for him.

In Iowa each county is, for specified administrative purposes, a corporation. Its affairs are managed by a board of supervisors.

The supervisor system superseded what is termed the county judge system. The powers and duties of the county judge were devolved in 1860 upon the board of supervisors, including the authority, and the checks upon it, to borrow money and to issue obligations therefor. (*Starr* v. *Des Moines County*, 22 Iowa, 492, 495, 1867.)

In the statement of the case, the statutes of the state respecting the power of the county authorities to contract debts are given. These statutes have been construed by the supreme court of the state and of the United States, and it is judicially settled by these tribunals that the county has the power to issue negotiable bonds like those in suit for borrowed money or extraordinary expenditures, if thereto authorized by a vote of the people. (*Hull & Argalls* v. *Marshall County*, 12 Iowa, 142; *Lynde* v. *Winnebago County*, 16 Wall. 6.)

These cases, in connection with *The Police Jury* v. *Britton* (15 Wall. 566), clearly lead to the conclusion that, while on the one hand there is no general power on the part of counties to issue negotiable paper which shall be free from equities in the hands of *bona fide* holders for value, yet there is such power in Iowa, when, for the purposes specified in the statute, its exercise is authorized by a vote of the people. The statute empowers the county authorities, on the prior sanction of a popular vote, "to borrow money" for public buildings, roads, and bridges, and this includes the incidental power to issue therefor the bonds of the county. It may be observed in passing that the duty of determining whether the vote has been adopted, and, if so, of entering it upon the records of the county, is one which the statute devolves upon the board of supervisors. (Revision 1860, sec. 255.)

The case before us, therefore, is one in which there is power given to the officers who signed and issued the bonds to do so, if thereto authorized by a previous vote, of the result of which they are by the statute made the judges. They have issued the bonds, and these are in the hands of holders for value. Those instruments recite that they "are issued in accordance with a

law of the state of Iowa and *authorized by a vote of the people of the county*, at the general election held October 9th, 1866, all the requirements of law having been complied with, and a tax authorized by said vote to be levied from year to year for the payment of the principal and interest of said bonds." If the facts stated in the recital are true, the officers of the county had the *power* to issue the bonds in suit, and presumptively the recital must be taken as true. In the well known decisions of the supreme court concerning municipal bonds, the principle is established that where the power exists by legislative authority to issue negotiable securities, and the local officers, who by the statute are invested with the duty to carry out or execute this power, issue the bonds with recitals that the right to issue them exists, or has arisen, and the bonds have passed into the hands of *bona fide* holders for value, they are not open to the defence of consideration or fraud on the part of the officers, or non-compliance with precedent conditions to the right to exercise the power. (*Knox* v. *Aspinwall*, 21 How. 539; *Moran* v. *Miami County*, 2 Black, 722, 724, 732; *St. Joseph Township* v. *Rogers*, 16 Wall. 644; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Kennicott* v. *The Supervisors*, 16 Wall. 452; *Lexington* v. *Butler*, 14 Wall. 282.)

The principle of these decisions it is the duty of this court implicitly to apply to cases which fall within it. It is useless to question the principle they assert, and in this place not fitting to do so. Applying it to the pleading before us, it shows, in connection with the recitals in the bond, a *prima facie* liability on the part of the county.

But one possible distinction between this case and cases which have been decided by the supreme court occurs to me, and that is, that in those the bonds have usually contained a recital that they were issued under a specified act, or to pay for stock subscribed in a railway company, or, as in *Lynde's Case* (16 Wall. 6), to pay for the erection of a county court-house. But the reason why the recital binds is, that it is made by the officers who are invested by the statute with the duty to decide whether the

condition has been performed which authorizes the issue of the bonds. The reason applies as well to the case where the recital is in the general form here adopted as where it is more specific.

DEMURRER OVERRULED.

NOTE.—After the foregoing decision was made an answer was filed, and, on demurrer thereto, the following points were ruled by DILLON and LOVE, JJ.:

1. In an action on a bond purporting to be issued by a county in Iowa, a plea of *non est factum* is a good defence.

2. Under the legislation of Iowa in respect of county bonds, a plea that a bond is invalid simply because it is not under the seal of the county, is demurrable. (*Ring* v. *Johnson County*, 6 Iowa, 265.) *Aliter* as to ordinary county warrants.

3. A plea to an action on county bonds, that no proposition to borrow money had ever been submitted to or voted upon by the people of the county, that the board of supervisors of the county never decided that any such proposition had been carried, and never ordered any issue of bonds, and that the bonds were issued by the county clerk on his own motion and without any authority from the board, and without their knowledge, he forging to the bonds the name of the president of the board of supervisors, *held*, on demurrer, to present a good defence.

THOMAS SAYLES *v.* DUBUQUE AND SIOUX CITY RAILROAD COMPANY.

1. Equity has jurisdiction of a bill by a patentee against an infringer which seeks a discovery and account of profits. (See *Stevens* v. *Kansas Pacific Railway Co. ante*, 486.)
2. The assignment by the patentee to the plaintiff, set out in the bill, held to give the latter the whole benefit of the invention, including any extended term.
3. The patent in question held, on demurrer, to have been extended at the instance and for the benefit of the inventors.
4. The act of congress of 1870, section 55, as to limitation of actions for infringements of patents, construed, and held to bar any claim in respect of the original patent.

5. Whether state statutes of limitation apply to suits for infringement of letters-patent, *quære?*
6. The defendant company is not liable for the profits made by a predecessor company.

(*Before* DILLON and LOVE, JJ.)

Patents for Inventions.—Jurisdiction in Equity.—Assignment.—Extension of Patent.—Statutes of Limitation.

LETTERS-PATENT were issued July 6th, 1852, extended July 5th, 1866, to Henry Tanner, for an improvement in railroad car brakes. The extended term expired July 6th, 1873. The plaintiff is Tanner's assignee. On February 5th, 1877, he filed his bill in equity, stating that the defendant has used the invention and derived large profits therefrom, and praying a discovery thereof and an account, etc.

The defendant filed a general and special demurrer to the bill, which was argued before DILLON and LOVE, JJ.

A. H. Walker, for the plaintiff.

George Payson, for the defendant.

Per Curiam—DILLON and LOVE, JJ., concurring.—We have considered the points made in argument upon the demurrer to the bill. We have no time to elaborate our views. It must suffice to state our conclusions. We do this at this time so that the cause may proceed. These conclusions are not, on all the points, so fixed as to preclude further argument and consideration on the final hearing. The views which we now entertain of the questions made, are as follows:

1st—As to the jurisdiction of equity over the bill. Although the original and extended term of the letters-patent had expired before this suit was brought, we think the bill can be maintained in equity, on the ground that it seeks a discovery and accounting for profits made by the defendant's use of the plaintiff's property, which profits, if not trust moneys strictly, are of that nature, and necessarily require an investigation, which a court of law is not so competent to make as a court of equity.

2d — As to the effect of the assignment to Tanner of April 1st, 1852. By an amendment to the bill of complaint, it appears that on the same 1st day of April, 1852, Tanner executed an instrument to the inventors, Thompson & Bachelor, by which the latter were to participate in the gains and benefits which should accrue to Tanner by reason of their assignment to him. Under the bill as amended, we are of the opinion that the said assignment of April 1st, 1852, by the inventors to Tanner, was intended to give to the latter the whole benefit of the invention, including the original term and any extended term.

3d — As to the extension of the patent on the 5th day of July, 1866. Assuming that Tanner executed a cotemporaneous agreement, such as is alleged in the amendment to the bill, the administrator of one of the inventors, and the other in person, having petitioned for the extension of the said patent, we are of opinion that it was within the competency of the commissioner of patents to grant such extension, since it was made at the instance of the inventors, and would inure to their benefit. Under these circumstances, although the legal title in the extension might be in the patentee, Tanner, the inventors would have a clear, equitable interest in it; thus satisfying the policy of the law in the encouragement and reward of inventors.

4th — As to the statutes of limitation. We are inclined to the opinion that the state statute of limitation has no application to suits in respect of the rights granted by letters-patent for inventions, but we leave the question open to further discussion. This bill was brought in February, 1877; the original term expired July 6th, 1866; the extended term July 6th, 1873. The act of congress of 1870, section 55, prescribed that "all actions shall be brought during the term for which the letters-patent shall be granted or extended, or six years after the expiration thereof." This limitation continued in force until the 1st day of December, 1873, when the revised statutes took effect, repealing it.

Since the original and extended term of a patent may be, and

often is, held by different persons, and since the language of the limitation statute of 1870 is ambiguous, in view of the injustice to defendants of requiring them to account for profits made any time since the date of the original patent, in 1852, a period of twenty-five years, when the proofs may be lost, we are of the opinion that their right is barred to recover for profits or damages during the original term. An inquiry of profits or gains within a period of five years is difficult, as the profits gained depend upon many conditions. When we come to carry such an investigation back for almost a quarter of a century, accuracy of results is almost impossible, and the laches of a patentee coming forward at such a late date does not give him a very favorable position in a court of equity.

What is the proper rule to measure compensation in a court of equity, is a question not arising on the demurrer, and is not implied from the above use of the words "profits" and "gains."

5th — As to the liability of the present company to account for profits made by the prior company. On its face the bill shows no liability of the present company for the profits gained by the former company. This liability is based upon an allegation of merger. What is meant by that, in a legal sense, as applied to these two corporations, we do not know or understand. If any facts exist which make the present company liable for the acts of the former company in respect of this patent, such facts ought to be stated in the bill. The amendment to the bill, in this regard, shows no liability on the part of the present company for the use of the patent by the prior company. The plaintiff has not established his debt or claim against that company by a judgment. That company is not a defendant here. No facts are stated showing that the property of the prior company, which was acquired by the defendant company, was taken with a trust fastened on it to pay the debts of the prior company.

An entry will be made on the demurrers in conformity with these views.

ORDERED ACCORDINGLY.

HENRY H. METCALF, Assignee of the Estate of A. Bernard, John G. Mead, and M. E. Mead, partners under the firm name of A. Bernard & Co., *v.* THOMAS OFFICER and WILLIAM H. M. PUSEY, partners under the name of Officer & Pusey.

1. It is not essential to the validity of an adjudication of bankruptcy against a partnership that a secret or dormant partner should be made a defendant.
2. The firm property is bound by an adjudication made against the ostensible partners.
3. A dormant or secret partner is not a necessary defendant at law or in equity.
4. Effect of non-joinder of a joint party to a contract discussed.

(*Before* DILLON and LOVE, JJ.)

Bankruptcy. — Adjudication of Bankruptcy against a Partnership. — Dormant Partner not a Necessary Party.

THE necessary facts are stated in the opinion of the court.

A. B. & J. C. Cummings, for the plaintiff.

C. C. Cole and *N. M. Pusey*, for the defendants.

LOVE, J. — This case is before the court upon the demurrer of the defendants to the plaintiff's petition.

The plaintiff, who sues as assignee in bankruptcy, shows that the petition in bankruptcy was filed on the 1st of May, 1877, by certain creditors of A. Bernard & Co., against A. Bernard and John G. Mead as the members composing that firm, and that on the 13th day of May, 1877, they were duly adjudged bankrupts; that on the 5th day of May, 1877, the plaintiff was elected assignee of said estate of A. Bernard & Co., and received a conveyance of the same from the register under the order of the court; that thereafter, on the 12th day of October, 1877, a supplemental petition was filed in the court of bankruptcy by said creditors, alleging that M. E. Mead was a part-

ner in said firm of A. Bernard & Co., and praying that she might be made a party and adjudged a bankrupt upon the original petition, and that such proceedings were had that she was, on the 19th day of November, 1877, made a party thereto and adjudged a bankrupt on said original petition as a member of said firm; that on the 24th day of January, 1878, an assignment was duly made, by order of the court, of all the estate that the bankrupts, or either of them, possessed on said 1st day of May, 1877. The plaintiff further states that about the 5th day of April, 1877, said firm of A. Bernard & Co. made a payment to defendants in the sum of $3,500, defendants being then creditors of said A. Bernard & Co. in said sum, and that said sum was paid under circumstances which made it a fraudulent preference under the bankrupt law.

The court having caused the papers in the original case to be certified for its inspection, finds it to be alleged in the supplemental petition, among other things, that the petitioning creditors were informed by both A. Bernard and John G. Mead, at the time of the purchasing of the goods which formed the basis of their claims, that said A. Bernard and John G. Mead were the persons composing said firm of A. Bernard & Co.; that they filed their petition in bankruptcy to put said partnership into bankruptcy under that belief; that, at the time of filing said creditors' petition, each of said petitioning creditors had been informed and believed that said firm of A. Bernard & Co., then carrying on business in Council Bluffs, Iowa, was composed of A. Bernard and John G. Mead; that each of said petitioning creditors continued in the belief that said A. Bernard and John G. Mead composed said firm until about the 27th day of September, 1877, when, upon the trial of a certain action brought by this plaintiff to recover assets claimed to belong to said estate, A. Bernard testified that Mrs. M. E. Mead, the wife of said John G. Mead, was a partner in said firm of A. Bernard & Co., and that, until it so appeared by the testimony of said A. Bernard, each of said petitioning creditors was ignorant of the fact that Mrs. M. E. Mead was a member of said firm. It also appears

by the original petition that the acts of bankruptcy were committed in the month of April, 1877, to-wit, on the 21st day of April, 1877, and at other times within the same month.

It is clear that the foregoing statements, taken together, amount to an allegation that Mrs. M. E. Mead was a dormant or secret partner of said firm, and that A. Bernard and John G. Mead were the ostensible partners; and this court will presume, after judgment, at least, that the district court, in which said supplemental petition was heard and determined, so found.

The object of the present suit is to compel Officer & Pusey, the defendants, to restore to the assignee the sum of money which they received from A. Bernard & Co., the bankrupts, in payment of the bankrupts' debt to them. It is claimed that the payment was an illegal preference, in fraud of the bankrupt law.

In support of this demurrer the defendants contend:

1. That a partnership can be put in bankruptcy only by proceedings against *all* the partners.

2. That the fact that there was a secret or unknown partner does not affect the question.

3. That the proceeding by supplemental petition was absolutely void, since common law governs proceedings in bankruptcy, and amendments are not allowed.

4. That the limitation prescribed by the bankrupt law ran till the amendment or supplemental petition was filed, which was after the expiration of the two months fixed by the amendment to that statute, and that, inasmuch as the amendment or supplemental petition was not filed until more than two months after the alleged acts of bankruptcy were committed, this action cannot be maintained.

Thus the question is whether or not it is essential to the validity of an adjudication of bankruptcy against a partnership that a secret or dormant member of the firm should be made a defendant. The adjudication ordinarily brings the individual as well as the partnership property, debts, and assets into bankruptcy to be administered, but this result follows the adjudication only

where the individual members whose property is to be affected are served with process or duly notified by publication. But may not the partnership property, debts, and assets be brought into bankruptcy and bound by the adjudication by serving the ostensible partners only? Is it absolutely necessary that the petitioning creditors should, in order to reach the partnership property, bring before the court an unknown member of the firm, whose existence as such is kept a secret by the ostensible members? If so, the most serious inconvenience and confusion would follow as a consequence.

The petitioning creditors cannot, in the first instance, do what to them is impossible. They cannot make members of the firm who keep themselves out of view, and with whom they have made no contract, parties defendant to the petition; and this is by no fault of the petitioning creditors, but rather by that of the members of the firm, both secret and ostensible. The cause against the ostensible members proceeds to adjudication; the creditors meet, choose an assignee, and by the order of the court all of the partnership property, and all of the individual property of the ostensible members who are served, is conveyed to the assignee; the assignee takes possession of the property and assets, collects and pays debts, adjusts liens, sells and conveys property, and makes dividends. After all this, it turns out that there was a secret partner, whom the petitioning creditors, not knowing, did not serve. What follows, according to the doctrine of this demurrer? The adjudication was an absolute nullity. The adjudication was the sole fountain of authority for all that has been done in pursuance of it. The counsel for the defendants contend that there is no remedy but to set aside the adjudication and serve the secret members of the firm; and I suppose that if at some future stage of the proceedings another secret member should be discovered, it would be necessary to set aside the adjudication again and begin *de novo*. But how, in the meantime, are the confusion and mischief arising from the sale and conveyance of the property of the bankrupt by the assignee, and the administration generally by that officer, to be remedied?

Upon this point the counsel have given us no light. It cannot, of course, be denied that the resulting mischief is the direct consequence of the misconduct of the ostensible partners, in first keeping the fact of there being another partner concealed, and in not, in the second place, pleading the existence of the secret partner in abatement.

Counsel, in order to justify a doctrine leading to such consequences, appeal to the analogies of the common law. I see, myself, no reason why a different rule as to parties in this respect should prevail in bankruptcy from that which obtains in equity and common law proceedings. What, then, is the rule at law and in equity as to the necessity of bringing in a secret partner in order to make a judgment valid as to the firm? It may be safely affirmed that it never was essential that a secret or dormant partner should be served in a proceeding at law or in equity. If any district court in bankruptcy has affirmed the contrary, it has simply mistaken the law, and it would have done well not to publish its opinion.

At common law the non-joinder of a party to a joint contract could be taken advantage of only by plea in abatement, in which it was incumbent on the defendant to give his adversary a better writ, as the phrase was — that is, it was necessary in the plea to name the parties jointly liable and not included in the original writ. If the defendant failed to plead in abatement, he could not avail himself of the omission to make the joint obligor a party on the trial by moving for a non-suit, and the plaintiff was entitled to judgment. But if the plaintiff failed to make a joint contractor with himself a party plaintiff, the consequence was much more serious, for the defendant might, at the trial, in such case, move for a non-suit, and the plaintiff's action fail. Such was the law even as to ostensible parties to a joint contract. With respect to dormant or secret partners, it never was, at common law or in equity, necessary for the plaintiff to join them in the action. The law was not so unreasonable as to require the plaintiff to join in his suit a party defendant with whom he had no contract or privity whatever, and of whose existence he had no notice.

The true rule is now settled to be that if the plaintiff has no means of knowing the existence of the dormant partner's relation to the firm, the partner sued cannot plead in abatement the non-joinder of the dormant partner. (*De Mantorb* v. *Saunders*, 1 Barn. & Ald. 398; *Ex parte Hodgkinson*, 19 Ves. 294; *Ex parte Norfolk*, *Ib.* 458; *Ex parte Watson*, *Ib.* 462; *Ex parte Matthews*, 3 Ves. & Bea. 126; *Baldney* v. *Ritchie*, 1 Stark. 338; *Sylvester* v. *Smith*, 9 Mass. 119; *Cookingham* v. *Lasher*, 38 N. Y. 656; *Bird* v. *McCoy*, 22 Iowa, 549; Parsons on Partnership, 290, 291.) If the plaintiff was unaware of the dormant partnership at the time of making the contract sued upon, he might or might not, at his election, join the dormant partner. (*Ex parte Hamper*, 17 Ves. 412; *Ex parte Liddle*, 2 Rose, 36; *Grellier* v. *Neale*, 1 Pea. 146; *Robinson* v. *Wilkinson*, 3 Price, 538; *Ex parte Layton*, 6 Ves. 438; *Hoare* v. *Dawes*, 1 Doug. 3, 371; *Wilson* v. *Wallace*, 8 Serg. & R. 55; *Page* v. *Brant*, 18 Ill. 37; *Cleveland* v. *Woodward*, 15 Vt. 302; *Blin* v. *Pierce*, 20 Vt. 25; *Hagar* v. *Stone*, *Ib.* 106.)

The question really is with whom the contract was intended to be made. It would be a most strange doctrine to hold that a party should be compelled in an action on a contract to join one as defendant with whom he has no covenant whatever; but since a dormant *partner* participates in the profits, and is in fact a partner, a creditor of the firm may, at his election, hold him responsible, notwithstanding the fact of the want of privity of contract between them.

It was, moreover, the practice at common law to proceed by *scire facias* against a partner who, though liable, was not joined in the original action. Indeed, the plaintiff could not proceed otherwise. He could not sue the dormant partner without joining the ostensible partners, and he could not unite them in a new and independent action against the dormant partner, because he already had a judgment against them. The plaintiff's true course, therefore, was to proceed by *scire facias* on his judgment, in which he recited the previous proceedings and judgment, and averred the fact of dormant partnership

and the consequent liability of the dormant partner, and prayed that he should be required to show cause why he should not be made a party to the judgment.

In the present case the writ of *scire facias* could not be employed. It is a common law writ wholly inapplicable to the original proceeding in bankruptcy. By analogy to it, however, the petitioning creditors in this case obtained leave to file a supplemental petition, stating the same facts and asking substantially the same relief. I have, myself, no doubt that in this way the secret partner was brought regularly into court and made a party to the adjudication. It is equally clear to my mind that all her effects and property were thus brought into bankruptcy to be administered. It does not, however, follow that third persons who were individual creditors of the secret partner, and who dealt with her as such, are to be affected injuriously by the delay in commencing the proceedings by supplemental petition to make her a party.

The supplemental petition was not filed until the two months had expired within which, by the provisions of the bankrupt law, it was necessary that it should be filed in order that the assignee might commence a suit to divest a third person of a fraudulent preference; and if this suit was an action by the assignee against an individual creditor of the dormant partner to impeach a payment to him out of the dormant partner's individual estate, I should, myself, strongly incline to the opinion that such individual creditor might successfully plead the limitation.

But this is not a suit to compel an individual creditor to restore a payment alleged to have been made to him out of the dormant partner's effects in fraud of the bankrupt law. This is a suit against a partnership creditor to compel him to repay to the assignee a sum of money which it is alleged the bankrupt firm paid him in fraud of the law. The proceeding to put the partnership into bankruptcy was commenced within the prescribed time. The limitation of the statute does not, therefore, apply to that proceeding. Both of the ostensible partners were served with process, and were regularly before the court. They

had informed the petitioning creditors that they were the only members of the firm. The service upon the ostensible partners was, as we have seen, sufficient to put the firm into bankruptcy. The adjudication was strictly regular as to the firm. The firm was, to all intents and purposes, by a valid judgment, subjected to the orders of the court of bankruptcy. The fact that a subsequent petition was filed to bring in a dormant partner did not in the slightest degree invalidate the adjudication against the partnership. The utmost that can be said of the supplemental proceeding is that it was irregular, erroneous, and insufficient to bring the dormant partner and her estate into bankruptcy. The ostensible members of the partnership could not complain of the error in the judgment under the supplemental petition. It was owing to their misrepresentations that the secret member was not made a party to the original petition. To allow them to conceal the existence of their secret partner, and then to defeat the action of the creditors by the plea that the adjudication was erroneous and void as to them, would be to countenance a direct fraud upon the creditors of the partnership.

There seems to be no solid ground whatever for the argument that the adjudication of bankruptcy against the partnership was not only erroneous, but null and void, because the secret partner was not originally made a party, and because she was subsequently brought into court by the supplemental petition.

The original petition in bankruptcy was filed within two months from the time when the acts of bankruptcy were committed. It was, therefore, in time to enable the assignee to sue a party who had obtained a fraudulent preference, to the prejudice of the creditors. But counsel insist that the filing of the original petition, without making all the partners, ostensible as well as dormant, defendants, was a void act, and that it was, therefore, wholly unavailable to the creditors. Now, it was a thing simply impossible for the petitioning creditors to make the secret partner a party until they discovered that she was a partner, and this they did not discover until it was too late. Why did they not make the discovery till after the expiration of the

two months? Whose fault was it? It was the fault of the partners themselves. All of the partners by concealment, and the ostensible partners by express representations, led the petitioning creditors into the erroneous belief that the ostensible partners were the only partners.

Shall the defendants be permitted to take advantage of their own wrong, or at least of their own fault, and defeat altogether the remedy of the petitioning creditors by pleading a delay caused by their own misconduct?

DILLON, *Circuit Judge*, concurs.

DEMURRER OVERRULED.

APPENDIX.

PROCEEDINGS BY THE BAR OF THE UNITED STATES COURTS FOR THE EIGHTH CIRCUIT ON THE RETIREMENT OF THE CIRCUIT JUDGE FROM THE BENCH OF THE CIRCUIT COURT.

[The following proceedings are inserted in this place by the reporter in compliance with the request of the bar below appearing.]

On the 26th day of May, 1879, the circuit judge sent the following letter of resignation:

DAVENPORT, IOWA, May 26th, 1879.

TO THE PRESIDENT:

I hereby tender my resignation of the office of circuit judge of the United States for the eighth judicial circuit, to take effect on the 1st day of September, 1879. The date thus fixed will enable me to attend the rest of the summer circuits to dispose of the unfinished business before me, and will likewise enable my successor, should he be nominated and confirmed before congress adjourns, to qualify in time to hold the earliest of the fall terms.

In voluntarily terminating a judicial career of nearly twenty-one years on the state and federal bench, it seems fitting to add that I take this step not because I am dissatisfied with the duties of the office, but because I have recently been honored by an election to a place of commanding usefulness in Columbia College, where the labors are lighter, the compensation greater, and which also, in the leisure it affords as well as in the duties it requires, offers opportunities for the study and advancement of the law that may well satisfy the highest professional ambition. I have the honer to be, with the highest regard,

Your obedient servant,

JOHN F. DILLON.

The resignation was accepted in the following letter:

DEPARTMENT OF JUSTICE,
WASHINGTON, June 11th, 1879.

HONORABLE JOHN F. DILLON, *United States Circuit Judge, Davenport, Iowa:*

SIR: — Yours of the 26th ult., tendering to the president your resignation of the office of circuit judge of the United States for the eighth judicial circuit, to take effect September 1st next, is received, and the resignation accepted according to its terms.

The president desires me to express his regret that we are to lose you in the judicial service, and to wish you a most cordial and agreeable career in the other duties which you have decided to enter upon. In these expressions will you permit me also to concur.

Very respectfully,

CHARLES DEVENS,
Attorney General.

KANSAS.

On the 10th day of June, 1879, the members of the bar in Kansas in attendance at the June term of the United States circuit court, at Leavenworth, passed the following resolution:

Resolved, That the Honorable A. L. WILLIAMS be authorized to present the accompanying address to the United States circuit court, and ask that it be spread upon the records; and that the Honorable ROBERT CROZIER, on behalf of the state judiciary, and the Honorable GEORGE R. PECK, the United States district attorney, on behalf of the practising attorneys of the United States circuit court for the district of Kansas, be requested to follow with appropriate remarks; and that the reporter be asked to insert the proceedings had in court in this behalf in the next volume of reports.

On the next day Mr. WILLIAMS presented, in open court, the following address on behalf of the bar, Mr. Justice MILLER presiding:

TO THE HONORABLE JOHN F. DILLON:

SIR: — At a meeting of the bar of the eighth circuit, assembled at the present term of the United States circuit court for the district of Kansas, it was unanimously ordered that an address be prepared and presented to you which should appropriately express the sentiments of the profession upon your voluntary retirement from the bench. In obeying that command, we feel that it is impossible by mere words to convey to you, and through this expression (which we shall ask to be made a matter of record) to the public, any adequate idea of our sense of inestimable loss in your retirement.

For ten years past it has been the habit of the bar of this circuit to look forward to the recurrence of your terms with the highest anticipation of the pleasure of meeting you as a friend and the invaluable experience of attending upon your righteous and learned judgments.

What has gone on so long and with unbroken regularity, and thus has been knit into a delightful custom, it had fondly seemed to us would end only with your earthly career. We can only look forward to the approaching close of this relation with sadness. It is seldom, we believe, that there is mingled in so great a degree the respect and admiration due to an able and upright judge with the tender regard which only characterizes sincere and intimate friendship as may be found in the case of the bar of your circuit towards yourself.

It is a matter of public concern when a judge, with special aptitudes for his great calling, ripened by twenty-one years of continuous experience, becomes *emeritus* and retires upon his well-earned honors. The loss is not ours simply, or chiefly, nor are we alone fully appreciative of it. But the connection of bench and bar is such that we can most appropriately testify to it.

We desire to assure you, sir, with a sincerity that is unfeigned, that though this proceeding partakes somewhat of the formality of procedure in a court of justice, yet this is no formal leave-taking. It is a parting that touches the heart and suffuses the eye.

We cannot hope to add by this tribute anything to your great fame as a chancellor and judge. Neither can we extend your reputation as a philosophic student and writer upon the law, already firmly established amongst all Anglo-Saxon people. We seek to express only our appreciation of your public services as a jurist as witnessed and known by ourselves, and our regrets that they are about to end.

The bar of your circuit owe you a debt of gratitude for many things, and not the least for the uniform help and encouragement you have ever extended to young practitioners. Your unfailing patience, the stimulus of your approving smile, your genial obliviousness of the crudities of the young lawyer struggling for a place with his abler fellows, have endeared you to both young and old, and taught us all lessons of charity and forbearance. Not a few of the younger lawyers of your circuit owe and attribute the greater part of the success they have achieved to the direct personal interest you have taken in their careers.

Nor should we omit gratefully to acknowledge the service we may all derive from the example of your professional and personal life. You have taught us not only that there is no excellence without great labor, but how marvelous a degree of excellence labor united to probity of conduct may attain. We behold in you one who owes nothing to fortune, and but little to preferment — one who has risen by force of merit alone. No envy or detraction can shadow any honors you have or may receive, or any fortune with which you may be endowed, for it must be admitted on all hands that every step in your ascending ladder has been fairly and industriously scaled.

And, finally, we desire to thankfully testify to your ability and absolute fairness as a judge. You have ever impressed upon the laity no less than the bar, by your clear and comprehensive judgments, that law is a rational and coherent science, the end of which is justice. Your decisions have always been illustrated with clear and judicious expositions of the law, which satisfied the reason and convinced the judgment. Your practical intellect has always penetrated the husks of discussion to the kernel of controversy, and your conclusions have, for the most part, not only met the approval of the bar generally, but have been warmly acquiesced in even by the counsel whom your judgments have defeated.

A term of this court has not only been regarded by the oldest and most experienced of our practitioners as a school where the better parts of their profession were ably taught, but it has been a source of pride to us all that, as counsellors here, we were assisting in as pure and efficient an administration of public justice as is possible anywhere.

It is with the greatest satisfaction, however, that the bar of this circuit is credibly informed that your new avocation will indulge you in that studious leisure which, with the preservation of your strength, must result to the highest benefit of the philosophic student of the jurisprudence of this country.

In conclusion, we would say that we hope and wish that every good fortune may attend you; that your physical and mental vigor may be long preserved for the sake of the noble science to which you have consecrated your life; and that you may preserve undimmed your recollection of the bar of the eighth circuit, who will ever remember you with the warmest affection and esteem.

W. H. ROSSINGTON,
EDWARD STILLINGS,
ROBERT CROZIER,
A. L. WILLIAMS,
J. D. CAMPBELL,
Committee.

Following this came an address on behalf of the practising attorneys of the United States circuit court, by Mr. GEORGE R. PECK:

MAY IT PLEASE THE COURT:

It would be obviously improper, in the performance of the duty assigned to me by my brethren of the bar, to mar the beauty and the appropriateness of the address just presented to the court by any formal or extended remarks.

This is no time for praise, unless it comes from the heart. What I could wish to do is to impress upon this proceeding that it is a tribute, not to the judge, but to the friend. As has been so well suggested by my friend, Mr. WILLIAMS, all motive for mere flattery is past. Whatever may be said here is the genuine and spontaneous feeling of the

heart, or it is nothing. The court, like the king, never dies. Judge DILLON'S place will be filled by another, and our contentions go on as before; but we shall miss the features of that familiar face, miss the tones of that familiar voice.

If I were called upon to analyze Judge DILLON'S character, I should place, where it properly belongs, the moral above the intellectual—the heart above the mind. Genius may inspire admiration, but it is only the kind and sympathetic heart that can win affection. Judge DILLON'S crowning glory is that goodness and greatness which has endeared him to all, and especially to those who, by reason of their professional duties, know him best. I do not doubt that he is ambitious in common with other men, and I presume he is not insensible to the many honors which have been showered upon him, but we have all seen in that pure and blameless life, that in the heart of the great judge, dearer than ambition, dearer than fame, is that sentiment so beautifully expressed in the lines of Tennyson:

> "Howe'er it be, it seems to me
> 'Tis only noble to be good.
> Kind hearts are more than coronets,
> And simple faith, than Norman blood."

I ought to speak of his learning, known and recognized by jurists and lawyers everywhere; of his legal writings, which are cited as authority in the rude court-room of the frontier and in the classic walls of Westminster Hall. I ought to speak of his industry, that devotion to the laborious duties of his station which has enabled him to do what I believe no other circuit judge has ever done—to hold two terms of court in each district of his circuit during every year of his administration of the judicial office; and when we remember that his circuit is an empire extending from the British possessions to Louisiana, from the Mississippi to the mountains and beyond, it seems almost marvelous. I ought to speak of that high sense of duty which governed all his judgments, and by which he measured all rights in the just and even balances of the law. I ought to speak of that clearness of vision which enabled him to see what we could not or would not see, which guided him straight through all our fallacies and all our sophistries to the very heart and truth of the matter. I ought to speak of that dignity mingled with human sympathy, which made it plain to all men that here was a man who never forgot that he was a judge; here was a judge who never forgot that he was a man. I ought to speak of that strong sense of justice and equity, that hatred of wrong and oppression, which were so marked in his judicial character, that I have thought if, like Sir MATTHEW HALE, he should enter unheralded the court-room of the unjust judge, robed only in a miller's coat and hat, all heads would bow and all tongues exclaim, "This is a judge!" I ought to speak of his firmness, which ever upheld the right and repressed the wrong with the same iron hand. I ought to speak of our pride—pardonable pride—

that when that venerable institution of learning, seated at the commercial gateway of the continent, with wealth and power at its command, sought to find the one man who could fill a most important chair, she reached her hand across the prairies and plucked this flower of our western civilization. But I have no heart to speak of these things at this parting moment. I can think only of his goodness, his kindness, and his sympathy.

I know not whether a lawyer's prayer can avail anything in the chancery above, but, speaking for all my brethren of the bar, if I would take him by the hand—that hand which has led us all so long—I would say, good bye, and may God give you peace, health, strength, and happiness, always.

On behalf of the members of the southern Kansas bar, the following address was delivered by Mr. A. A. HARRIS, of Fort Scott:

MAY IT PLEASE YOUR HONOR:

The members of the bar of the southern portion of the state feel that they cannot permit this occasion to pass without an expression of their approbation of every word of the address which has been reported and unanimously adopted.

Accordingly, as their humble spokesman, I here declare, not only for them, but for the people of southern Kansas, irrespective of party, creed, or sect, that, in common with the enlightened people of the whole circuit, we greatly regret Judge DILLON's determination to retire from the bench.

Upon one occasion, when a client of mine had a suit pending in this court which involved to him a very large sum, and an adverse decision of which would reduce him to poverty, I was asked by him what sort of a man Judge DILLON was, and what sort of a court we had to try our case in. I told him that Judge DILLON was a pure man, and an able man; that the court was the best one in which to try a good case that I had ever practised in, and the worst one in which to try a bad case. I intended, sir, by that to say, that in the court where Judge DILLON presided law and justice were impartially administered.

At the June term, 1878, on a motion to remand a cause to the state court, in which some exceedingly difficult points were to be determined, Judge DILLON, after argument by myself and my very able opponent, told us from the bench one morning that he would be glad to hear us further on the points involved. I could but say to him that about all I knew about the removal act of 1875 I had learned from him.

Sir, I care not what may be the wisdom of the executive, or that body which has the power to confirm his nomination, *we* shall not find in Judge DILLON's successor the stout arm, the clear intellect, and full, complete learning upon which we have heretofore so implicitly relied.

We part with him with great regret. We shall watch his future career with great interest, and, howsoever fortune may smile upon him, he may rest assured that he has no warmer, truer friends than we.

On behalf of the state judiciary, the following remarks were made by Mr. ROBERT CROZIER:

I would have been satisfied to have abided by the report of the committee as embodying my own views of the subject under consideration, but having been chosen by the committee to speak on behalf of the judiciary of the state, in addition, a few words are appropriate. Being an old citizen of the state, and well acquainted with the judiciary thereof from the origin, I feel at liberty to express that which I am fully advised are the views of the gentlemen occupying judicial positions in the state at the present time.

Before the advent of Judge DILLON as judge of the eighth circuit, we were prepared, looking to his former reputation as a jurist, with which we were to a considerable extent acquainted, to welcome him with glad faces and open arms, and we did so. During the time of his administration of the law as judge of the eighth circuit, our expectations as to his manner of conducting the business of that position were and have been fully realized. We all have looked to the recurrence of his terms as seasons when we might be enlightened by his luminous exposition of the laws and the acknowledged justness of the decisions he made; and we were glad to be permitted, in the exercise of the functions devolving upon us, to sit under the rulings of one commanding the respect of the whole of us.

After an experience of ten years, I can now say, for the judiciary of the state, that our highest expectations in this regard have been more than fully realized; and now that the fates have decreed there shall be a final separation, our admiration is as glowing as at the beginning. We welcomed him with open arms upon his advent; and we bow him out at his exit with the same feelings of respect and kind regard that then influenced us. He goes to a place occupied by one of the distinguished sons of the republic — a position of commanding influence in moulding the jurisprudence of the nation; and although separated from us physically, we shall feel contented that we shall hear from him as one of the great brotherhood of lawyers, whose influence in moulding the destinies of the nation are superior to that of any other class of its citizens.

Individually, I have been honored with his acquaintance and flattered with his personal friendship; and I can say for myself, and, I think, for that, for the judiciary of the state, that the regret at his departure will be considered not only a personal loss to us, but a deprivation to those with reference to whom we must administer the laws of the state. We take, however, to ourselves this consolation, that, though

removed to another sphere, it will be one of such commanding influence that, although not binding upon us, we shall be compelled to respect his utterances.

Whatever betide—whether we see him again speedily or otherwise—when he comes amongst us again, although disrobed of the ermine, we shall welcome him as cordially, respect him as thoroughly, and admire him as unreservedly, as at any stage of his career among us, when clothed with power to command us.

RESPONSE OF JUDGE DILLON.

GENTLEMEN OF THE BAR:

I have no words fitting to respond to the addresses with which I have just been honored. My mind is burdened and saddened by the reflections which this parting scene suggests. How can I give them expression? I ought scarcely to attempt it.

I feel bound to the state of Kansas by ties peculiarly strong. Ten years ago, although a stranger to them personally, the bar of this state, with great unanimity, recommended my appointment.

Since 1869, I have been present at every term of the circuit court in Kansas, except in June, 1875. I have seen the docket grow from sixty cases to five hundred. I have given, relatively, more of my time to Kansas than to any other part of my circuit. My relations, therefore, with the bar which I see before me to-day, have not been distant and occasional, but constant and intimate.

It gives me the sincerest pleasure to be publicly assured, at a time when no motive for flattery can be perceived, that my retirement from the bench is regretted. Your approving judgment, your words of kindness and generous praise, and your well wishes for my future welfare, are dear to my heart.

No ordinary temptation has induced me to surrender my commission as the judge of this circuit. No surprise could have been greater than the offer of Columbia College, which I finally accepted. I saw from the first what a wide field of usefulness, and possibly of distinction, it opened before me. I perceived at once the advantages of its more liberal compensation, lighter labors, and greater opportunities. But I assure you that it cost me a painful struggle for more than two months to consent to leave the associations of a lifetime—to exchange old friends like those now present for new acquaintances, to leave the circuit I love so well to go to untried duties beneath a strange sky and among unfamiliar faces.

If my health and strength are preserved, I shall strive to vindicate the wisdom of my decision by strenuously devoting my energies to the elevation and advancement of law. In the venerable institution to which I have been called, the great Chancellor KENT, pure and simple in his character and tastes as a child, after he had voluntarily closed his judicial career, and when the shadows of his life were cast towards

the east, delivered the lectures which constitute his Commentaries on American Law, and which will cause his name to be known and cherished for generations to come, wherever, in its widening conquest, the English language shall carry the English law. Such an example may well tempt and inspire the humblest of his successors.

The change I have made, although great, is not radical. It enables me the better to carry out the fixed plan of my life. When called to the bench, nearly twenty-one years ago, the picture of the judicial office as drawn by SIDNEY SMITH before the lawyers of the northern circuit made a deep impression on my mind. Even now I think I can recall it from memory: "He who takes the office of an English judge as it exists at this time, takes into his hands a gem, great and glorious, perfect and pure. Shall he mar it? Shall he darken it? Shall it emit no light? Shall he find it a diamond? Shall he leave it a stone?" The ideal of an American judge should, I have always conceived, be equally high.

I have had many and great controversies to decide. You know me well, and it is an estimable satisfaction to be assured, in this impressive and public manner, that, in your judgment, I do not surrender the jewel of the great trust which I have had in my keeping marred or dimmed or darkened.

But I may not say more. I part from you with the most unfeigned regret. From the bottom of my heart I reciprocate your regard in the amplest measure. The richest legacy I carry with me, next to the consciousness that in the record of my judicial life there is not a single line that, living or dying, I would wish to blot, is the expression of your friendship, confidence, and regard contained in the address with which you have so signally honored me, and in the remarks which have accompanied it. I shall cherish it as long as I live, and its record here is one to which my children, and those who care for me after I am gone, will point with pride. Farewell!

Mr. Justice MILLER then said:

The court is in full sympathy with the bar in the sentiments which have just been expressed in regard to the retirement of one of its members. Judge DILLON'S resignation is a loss which must be felt by the bar of the eighth circuit, by the people among whom he has administered justice so long and so well, and by his associates on the bench of which he is about to take leave. This loss, however, is not equal in its effects upon all these classes. His brethren in the courts, who have cooperated with him in the arduous duties of a judge, who have received his aid, who have been with him in council and shared his labors, are the heaviest losers. It is, therefore, eminently appropriate that they should join in testifying to their appreciation of the man and his services by directing that the communication from the bar be spread upon the records of the court.

If I may be permitted, as the presiding justice for the circuit for a period including the entire time of Judge DILLON's service in the court, to indulge in a suggestion of my own special misfortune in the matter, I must say that it is greater than that of others; for he whom I had hoped, as he came later, might remain longer in this court than I, and to whom would have fallen the duty of making the sad comments appropriate to the severance of our official relations, is the first to leave our common sphere of official duty.

Though in his case the cause is one which carries him to a less laborious, a more profitable, and let us hope a more agreeable and perhaps useful field of labor, and though this must, as it ought, mitigate the pains of separation, it remains true, as regards myself, that I cannot hope in any successor, however talented by nature or accomplished by learning, the same assistance in the performance of my own judicial duties, and the same relief from unnecessary responsibility as presiding justice, which have made my relations with him so pleasant.

When you add to this the interruption, more or less, of our social relations — relations which are imperfectly expressed by the strongest terms of affectionate friendship and unlimited confidence — it will be seen with what emphasis I unite with the bar and other members of the court throughout the circuit in this cordial tribute of respect and expression of regret at the retirement of Judge DILLON from the bench.

MISSOURI.

ST. LOUIS, July 12th, 1879.

HONORABLE JOHN F. DILLON:

MY DEAR SIR:—At a meeting of the bar of this city a committee was appointed, consisting of GEORGE A. MADILL, ALEXANDER MARTIN, THOMAS C. REYNOLDS, JAMES TAUSSIG, G. A. FINKELNBURG, JOSEPH SHIPPEN, and JOHN R. SHEPLEY, to prepare and submit an address to you upon the occasion of your retirement from the bench, to be subscribed by the members of the bar, placed before the circuit court for the district, and then transmitted to you. These were done, and now by their direction I enclose to you that address; and in so doing, permit me to say that there are few things in my professional life that have given me greater pleasure than to transmit to you this record of the high estimation in which you are held by your brethren of the bar in this district. You will find there the names of all those, except a few absent from the city, who have been connected with the court over which you have presided for so many years with such distinguished ability.

Yours truly, JOHN R. SHEPLEY.

ADDRESS OF THE BAR.

ST. LOUIS, June 23d, 1879.

HONORABLE JOHN F. DILLON:

SIR:—As members of the St. Louis bar, we desire to express our regret that your official connection with the United States circuit court for the eighth circuit is about to terminate. But your voluntary retirement from the bench to another field of professional honor and usefulness affords an opportunity, which we gladly embrace, of presenting to you this expression of our respect and confidence.

To you, as an author, the profession recognizes its indebtedness for a work which is a permanent contribution to legal literature, and is accepted as a standard authority wherever the English language is spoken. To you, as a judge in high station for nearly twenty-one years, we bear testimony to a career distinguished by uniform dignity and courtesy, by marked ability, great industry, and perfect integrity. Questions of wide variety and of the gravest importance have engaged your attention, and found their solution in judicial opinions marked by clearness of statement, vigor of thought, and profundity of learning. To the discharge of onerous duties you have brought a mind gifted with sound judgment, fortified by varied experience and enriched by wide research.

While your career has largely advanced and elevated the science of the law, it has also endeared you personally to the hearts of the people among whom your labors have been performed. Assured that you bear from the west to the east a public judgment of duty well and faithfully discharged, accept this our sincere testimonial to worth and ability.

Signed by JOHN R. SHEPLEY, THOMAS C. REYNOLDS, JOHN W. NOBLE, D. P. DYER, JAMES O. BROADHEAD, HENRY HITCHCOCK, THOMAS T. GANTT, GEORGE A. MADILL, JOHN B. HENDERSON, JOHN D. S. DRYDEN, CHESTER H. KRUM, JOSEPH SHIPPEN, THOMAS C. FLETCHER, and by one hundred and forty other members of the bar of St. Louis.

DAVENPORT, IOWA, July 14th, 1879.

HONORABLE JOHN R. SHEPLEY:

MY DEAR SIR:—I have the honor to acknowledge the receipt of your letter of the 12th inst., transmitting, by the direction of the committee, the address of the members of the bar of the city of St. Louis upon my retirement from the bench of the circuit court. This impressive testimonial of the respect and estimation in which I am held by the bar of the great city of St. Louis, where for the past ten years so considerable a part of my official duties have been performed, has given me the sincerest pleasure. I have read it with pride, and shall preserve it, with the autograph signatures, as a cherished memorial of my life on the circuit. I gladly avail myself of this occasion to express to the learned bar of St. Louis my grateful acknowledgments for their uniform kindness, respect, and consideration, and especially for the address with which they have honored me. I beg to assure them that I carry from the west to the east nothing which I more truly prize than their ap-

proving public judgment and friendly regard. Asking you personally to accept my thanks for the kind sentiments with which you accompanied the address, I remain, as ever,

Very truly and sincerely yours,

JOHN F. DILLON.

There was subsequently presented, on behalf of the members of the bar and the citizens of St. Louis, the following invitation, engraved and elegantly illuminated:

ST. LOUIS, Mo., September 1st, 1879.

TO THE HONORABLE JOHN F. DILLON, *United States Circuit Judge of the Eighth Circuit:*

SIR:—The undersigned, lawyers, business men, and others, citizens of St. Louis, Missouri, viewing with profound regret the prospect of your relinquishment of the judicial station you have so eminently adorned, desire to make a suitable demonstration of their high respect and regard for you personally, and of the veneration in which you are held as a wise, learned, and upright judge by them and the entire community of this city. They therefore tender you a public banquet, in St. Louis, at such time as you may be pleased to designate.

We are, sir, your obedient servants,

JOHN R. SHEPLEY,	GERARD B. ALLEN,
GEORGE A. MADILL,	THOMAS C. REYNOLDS,
JOHN B. HENDERSON,	HENRY HITCHCOCK,
JOHN C. ORRICK,	JOHN M. KRUM,
ELMER B. ADAMS,	C. S. HAYDEN,
A. M. THAYER,	SAMUEL T. GLOVER,
JOHN W. NOBLE,	JOHN D. S. DRYDEN,
WILLIAM PATRICK,	CHESTER H. KRUM,
JAMES O. BROADHEAD,	THOMAS T. GANTT,
NATHANIEL HOLMES,	CHARLES P. JOHNSON,
JAMES J. LINDLEY,	S. D. THOMPSON,
DAVID WAGNER,	D. P. DYER,
LUCIEN EATON,	THOMAS C. FLETCHER,
NEWTON CRANE,	M. DWIGHT COLLIER,
NATHANIEL MYERS,	R. J. LACKLAND,
THOMAS E. TUTT,	WILLIAM BARR & Co.,
SCRUGGS & BARNEY,	SAMUEL C. DAVIS & Co.,
GEORGE BAIN,	E. O. STANNARD,
	And ninety others.

To which was given the following response:

DAVENPORT, IOWA, September 15th, 1879.

GENTLEMEN:—I have the honor to acknowledge the receipt of your communication of the 1st inst., in which, after expressing your regret at my retirement from the judicial station I have held among you so long,

you offer me the compliment of a public banquet as a testimonial of your respect and regard.

I perceive from the signatures to the invitation that it comes from many of the eminent lawyers, great merchants, and leading citizens of the city of St. Louis.

Of the similar expressions which the event referred to has called forth in this judicial circuit, none has penetrated me more sensibly; and if anything could make me regret a step taken from a sense of duty to myself and my family, it would be that I was leaving a region in which my judicial labors are so generously viewed and parting from friends so devoted, to enter upon untried duties in a community in which I am personally almost a stranger. I had hoped until to-day that I might be able to accept the proffered honor, but, for reasons which I need not detail, I find that I must go east immediately, and it is quite uncertain when my duties and engagements there will allow me to return to the west. I am, therefore, most reluctantly obliged to forego the pleasure of meeting you in the manner you propose, and the privilege of expressing my profound sense of the many obligations under which the people of St. Louis have placed me, and saying my farewell to you and your citizens in person.

Permit me to add yet another word. I look upon your invitation not simply as a compliment to me personally, but also as an expression of your sense of the supreme importance of the judicial office, not only to the great interests which you represent, but to the entire country.

The fearless and independent discharge of the duties of a judge will inevitably bring him into frequent collision with private interests and public sentiment. In such a discharge of duty the judge needs at all times the consciousness of the support of the substantial interests of the community. It gives me pleasure to say that I have always noticed a sound, healthy, and enlightened public opinion on this subject among your citizens, and every judge in this country, of whatever grade, will be animated, cheered, and strengthened by your influence and example.

I have the honor to be, as ever,

Most obediently yours,

JOHN F. DILLON.

Messrs. JOHN R. SHEPLEY, GERARD B. ALLEN, GEORGE A. MADILL, THOMAS C. REYNOLDS, JOHN B. HENDERSON, and others.

ARKANSAS.

A large meeting, composed of the Little Rock Bar Association and of members of the legal profession from other parts of the state now attending court at the capital, was held on Satur-

day morning, June 14th, 1879, at the supreme court-room, for the purpose of taking appropriate action in relation to the resignation of the Honorable JOHN F. DILLON of the office of United States circuit judge for this judicial circuit.

Upon motion of the Honorable HENRY C. CALDWELL, judge of the United States district court for the eastern district of Arkansas, the Honorable E. H. ENGLISH, chief justice of the supreme court of the state, was elected president of the meeting, and Mr. EBEN W. KIMBALL secretary.

The chief justice, upon taking the chair, cordially thanked the meeting for the honor conferred upon him on this occasion. He then briefly stated the object of the meeting, and said that he, in common with the whole bar of the state, exceedingly regretted that Judge DILLON had resigned his present position on the bench, which he had so long, so acceptably, and so honorably filled, and where he had won a national reputation; that Judge DILLON was a man of pure and exalted character—a judge of extraordinary attainments, application, and legal knowledge, and one whom the people of the west and of Arkansas regretted to see retire from the judiciary. But, he said, while he now leaves the bench, he will not be lost to the profession, for in his new vocation (a position which would do honor to any lawyer) he would not only be able to instruct the young men of the country in the science of the law, but also to write law books for the use of the profession generally—a work for which no one seemed better fitted than Judge DILLON.

The chief justice spoke very feelingly and eloquently of the high character and great services of Judge DILLON, and was listened to with marked delight and approval.

Upon motion of Mr. U. M. ROSE, the chair appointed a committee of three to draft resolutions properly expressing the sentiments of the bar of Arkansas in relation to the resignation of Judge DILLON. The committee consisted of Messrs. U. M. ROSE, T. D. W. YONLEY, and R. A. HOWARD.

The committee reported the following resolutions. Before reading them, Mr. U. M. ROSE read to the meeting the following extract from a letter recently received by him from Judge DILLON:

LEAVENWORTH, KANSAS, June 8th, 1879.

DEAR JUDGE:—Your letter of the 24th ult. has followed me around the circuit and found me here. It anticipated an event which became a fact accomplished before it was received. I could easily perceive all the probable advantages of the offered exchange of places—the lightened labor, the increased compensation, and opportunities for professional gains or distinction, if, happily, I had the ability to achieve the latter; and yet I hesitated long in reaching a resolution. I hope I have decided wisely. It cost me a painful struggle to consent to leave the friends and associations of a lifetime, and particularly the bar of the circuit, to whom I feel so much indebted and so warmly attached. My thoughts and reflections are tinctured with sadness whenever I think that I have severed the ties which connect me with the circuit, and go to new duties, in a strange and distant place. If my health remains to me, I shall try to demonstrate the soundness and wisdom of my judgment by doing more for my profession than it was possible for me to do on the tread-mill of the bench, with its ever-increasing weight of duties.

I beg leave to add that I part with no district with more sincere regret than with yours, with Judge CALDWELL and the bar of Arkansas. I have always been treated by them with marked consideration and kindness.

Very sincerely yours,

JOHN F. DILLON.

Honorable U. M. ROSE.

RESOLUTIONS.

Resolved, That, having been advised of the resignation by the Honorable JOHN F. DILLON of his position as judge of this circuit, we are impressed with a feeling of regret, and desire to convey to him in a respectful manner our sincere admiration for the great learning, impartiality, and uprightness displayed by him while on the federal bench, the soundness and accuracy of his opinions, and his uniform kindness and courtesy to the bar; for a consistent administration of justice that has shed a lustre on the science of the law, and has in many ways conduced to its clearness and purification.

Resolved, That, as Judge DILLON retires to another field of labor, we trust that he may find in it a wider usefulness, and some diminution of the arduous toil that has marked his judicial life, and which seemed to test the limits of physical and mental endurance; and we beg leave to assure him that he carries with him our best wishes for an easier and a long and prosperous life, during which he may, by his investigations, add to his valuable contributions to legal learning, which have already made his name a household word with the bar and the courts of the country.

Resolved, That the secretary of this meeting be requested to forward to Judge DILLON a copy of these resolutions.

Upon motion of Mr. M. W. BENJAMIN, the resolutions were unanimously adopted.

Upon motion of Honorable R. C. NEWTON, Judge ROSE was requested to furnish the meeting with a copy of the abstract of Judge DILLON'S letter, just read by him, and the same was made a part of its proceedings.

It was moved by Mr. JOHN MCCLURE, and carried, that the secretary of this meeting be requested to furnish the papers of the city with a copy of its resolutions and other proceedings for publication.

Upon motion of Mr. YONLEY, the secretary was requested to present to the United States circuit court for this district a copy of the proceedings of this meeting, with the request that they be spread upon the records of that court.

The meeting then adjourned.

A true copy.

Attest: EBEN W. KIMBALL, *Secretary.*

The following answer was given:

DAVENPORT, IOWA, July 9th, 1879.

MY DEAR SIR:—I have the honor to acknowledge the receipt of the proceedings of the bar of Little Rock relative to my retirement from the bench. I am deeply sensible of the debt I owe to the bar of your state, and I fully prize this expression of their regard and friendship. I am grateful for it. It places me under a perpetual obligation. I part from them with unaffected regret. They have a sunny spot in my heart, and a cherished place in my memory. I beg you to accept, personally, my warm thanks for your kind expressions and well wishes.

I am, very truly and sincerely yours,

JOHN F. DILLON.

EBEN W. KIMBALL, ESQ., *Secretary, Little Rock.*

NEBRASKA.

At a session of the circuit court of the United States for the district of Nebraska, held at the court-house in the city of Omaha, on the 26th day of June, 1879—Honorable ELMER S. DUNDY, district judge, presiding—Mr. E. E. BROWN, a counsellor of the court, appeared and stated that on that day, at a

meeting of the members of the bar, whereof he was president, a committee was appointed to express in fitting resolutions the sentiments of the meeting upon the occasion of the retirement of his honor, the circuit judge, from the bench, which committee consisted of Mr. J. M. WOOLWORTH, Mr. E. WAKELY, Mr. CLINTON BRIGGS, Mr. J. H. BROADY, and Mr. D. G. HULL; that the said committee had reported to the meeting certain resolutions, which were unanimously adopted; and that the said meeting had instructed him to present the same to the court and move that the same be spread at length upon its records. He thereupon presented the said resolutions to the court, and moved that the same be recorded in the record of its proceedings. Whereupon it was ordered that the motion be granted, and the clerk spread the said resolutions at length upon the records of the proceedings of the court. The resolutions are as follows:

WHEREAS, The judge of this circuit, the Honorable JOHN F. DILLON, is about to surrender his trust by resignation, to accept a high honor tendered to him by Columbia College, we, the members of the bar in attendance upon the United States circuit court, for ourselves and in behalf of the bar of this state, do resolve:

First. That, during the whole of his service on the bench of this circuit, which was preceded by a judicial career of much honor, Judge DILLON has devoted to the discharge of his great and laborious duties the full measure of integrity, capacity, learning, industry, and impartiality demanded of the incumbent, as attested by the general judgment of the bar and the people.

Second. As a jurist and legal author, he has advanced the profession, has won a national reputation, and reflected credit upon the west, where his work has been done.

Third. As a citizen and man, he has secured the very high respect and confidence of the public, by the sincerity, uprightness, and purity of his life and character, his fidelity to obligation, and his sense and love of justice in the administration of his office.

Fourth. In the new and responsible field of duty to which he is called, he will have our utmost faith in his ability to meet its demands with signal usefulness and success, and our earnest wishes that he may be in all things prospered.

Fifth. That the circuit court be requested to cause these resolutions to be entered in the record of its proceedings, and that a copy thereof be transmitted to Judge DILLON.

IOWA.

DES MOINES, IOWA, August 22d, 1879.

HONORABLE JOHN F. DILLON, *Davenport, Iowa*:

DEAR SIR:—The bar of Iowa desire that you will accept at their hands, at such time as will suit your convenience, a complimentary banquet. We have been appointed a committee of the bar of the state to communicate this wish. Allow us to suggest some evening during the next term of the United States circuit court at this place.

We sincerely hope you will accept this proffered compliment. So long identified with the profession and with the judiciary, so intimately connected with the growth and prosperity of Iowa, and so much esteemed and respected as you are by her bar and people, we shall regard it as a very great pleasure indeed to unite and extend to you our friendly greetings before you leave to enter, as we hope, upon even a larger field of usefulness. Be pleased to advise us of your pleasure in the premises.

We are, Judge, as ever, your friends, truly,

GEORGE G. WRIGHT, Des Moines,
JOHN H. CRAIG, Keokuk,
E. H. STILES, Ottumwa,
W. F. BRANNAN, Muscatine,
GEORGE J. BOAL, Iowa City,
O. P. SHIRAS, Dubuque,
JOHN N. ROGERS, Davenport,
N. M. HUBBARD, Cedar Rapids,
} *Committee.*

The following response was made:

DAVENPORT, IOWA, September 13th, 1879.

GENTLEMEN:—Your invitation to accept a complimentary banquet from the bar of the state came here in my absence and awaited my return. I have held it for some days unanswered, and have just definitely ascertained that it will not be practicable, in view of my other duties, to engage to accept it, as I am called east immediately, and the time of my return to the state is uncertain.

I trust it is unnecessary to add that the invitation and the warm terms in which you have been pleased to refer to me and to my judicial and other labors are sensibly felt and fully appreciated, for I assure you that I am bound to the state of Iowa by no ordinary ties. For one and forty years I have lived within this state. As a boy I played upon the banks of her great river, and her noble prairies have become incorporate into my very existence. Here I was educated and married; here my children were born; here I have been honored by successive elections to high judicial station; and here, under her skies, my sun has already passed its meridian.

Iowa has been to me a generous mother, and neither time nor dis-

tance can weaken my attachment to her. My relations, public and private, have been chiefly with the bar of the state, and I am truly sorry that I am precluded by other engagements from accepting the most grateful, and in all probability the last, honor I shall ever receive at their hands.

I remain, as ever, very sincerely and faithfully yours,

JOHN F. DILLON.

To the Honorable GEORGE G. WRIGHT *and others, committee.*

MINNESOTA.

The members of the bar of the district of Minnesota, at the opening of the June term of the United States circuit court, at St. Paul, on the 16th day of June, 1879, held a meeting to determine what testimonial of their respect and esteem should be tendered to Judge DILLON on the occasion of his withdrawal from the bench of this circuit.

A committee composed of CHARLES E. FLANDRAU, JOHN B. SANBORN, GEORGE L. OTIS, GEORGE B. YOUNG, and HARVEY OFFICER, was chosen, with full powers to represent the bar of the district and arrange such proceedings as in their judgment would be suitable and proper.

It was decided to tender to Judge DILLON a banquet and an address.

The following correspondence ensued:

ST. PAUL, MINN., June 20th, 1879.

HONORABLE JOHN F. DILLON:

DEAR JUDGE:—The bar of Minnesota learning that you are about to terminate your judicial relations with this district, desires to manifest its very high esteem for you as a man, a friend, and a judge, and invites you to meet it at a dinner to be given in your honor at the Metropolitan Hotel, in this city, at such time as may be agreeable to you. We hope you will gratify us by accepting this invitation, and to designate such time as will best suit your pleasure and official engagements.

With much respect, truly your obedient servants and friends,

CHARLES E. FLANDRAU,
JOHN B. SANBORN,
GEORGE L. OTIS,
GEORGE B. YOUNG,
HARVEY OFFICER,
} *Committee.*

REPLY.

ST. PAUL, MINN., June 27th, 1879.

GENTLEMEN:—Your invitation to a banquet proposed in my honor was received some days since. I have been waiting till some fortunate interval in my official duties would allow me to accept it. But it has turned out otherwise, and the demands upon my time are such that I must leave St. Paul on to-morrow. Much to my regret, I am compelled to decline, during my present stay, an invitation which, you scarcely need to be assured, it would have given me the sincerest pleasure to have accepted. I beg to tender to the bar my thanks for this renewed mark of their regard.

With great respect, I am very truly and sincerely yours,

JOHN F. DILLON.

Messrs. CHARLES E. FLANDRAU *and others, committee.*

On the 28th day of June, 1879, the bar having learned that Judge DILLON would take his departure from the city in the evening of that day, assembled in the court-room, under the call of the committee, in large numbers, at 3:30 P. M.

On the opening of the court, Judges DILLON and NELSON being on the bench, Mr. FLANDRAU, who had been chosen by the committee to deliver the address of the bar, addressed the court as follows:

MAY IT PLEASE YOUR HONORS:

The great majority of the members of the bar of this district have grown up with it since its organization, and will probably continue to practise in it until their retirement. It is natural, therefore, that we should feel a deep interest in the question as to who shall be intrusted with the administration of its affairs. When the growth of the west rendered it necessary to increase the force of the federal judiciary by the creation of the circuit judges, we were all much rejoiced when we learned that Justice DILLON had received the appointment for this our circuit. He was no stranger to us—his fame as a jurist had preceded him. His services have so endeared him to us all that when we learned of his intention to resign his position, although in exchange for new honors, our regret was great, and we determined that he should take with him an avowal of our sentiments.

A committee of the bar of the district have prepared an address to be presented to Judge DILLON, and have conferred upon me the honor of bearing it to him. With the permission of your honors, I will now deliver it.

THE ADDRESS TO JUDGE DILLON.

HONORABLE JOHN F. DILLON, *United States Circuit Judge, Eighth Circuit:*

DEAR JUDGE:—The members of the bar of this state have learned, with profound regret, that you have decided to sever your connections with the bench of this circuit. They have enjoyed, for the long series of years during which you have been its presiding justice, such agreeable relations with you personally and officially, and have held you in such high esteem as a man and a judge, that they desire to make some public expression of the sentiments universally entertained by them on the occasion of this their last opportunity of holding official communication with you.

We will not ask you, or the world, to weigh our opinion by the standard of our professional consequence; we know that we represent a frontier district, and we have nothing to say as to our own importance, but we can, without egotism, affirm that we are a fearless and independent bar, and that nothing could induce us to give expression to what we did not conscientiously believe. Let the value of our views, then, be measured by their sincerity.

We recognize in you a man of extraordinary learning in all the branches of knowledge that combine to make a thoroughly good judge. We also concede to you all those qualities of temperament which are essential to the same end. You have been patient, when we have been tedious; you have been amiable, when we have been irritable; you have always been clear, when we have been in doubt. It has been an edifying pleasure to us to listen to your lucid expositions of the many difficult questions which we have, in the discharge of our professional duties, so often submitted to you for solution. The varied interests that have been referred to your decision have involved the welfare of the greatest enterprises of the northwest, and these contests have arrayed in antagonism forces of corresponding magnitude; yet your wisdom and impartial justice have enabled you to satisfy all interests and make your judgments respected by all parties.

The highest tribute we can pay to your excellence as a judge is to say that in all the long years in which we have practised before you, and in all the various contests which we have represented as counsellors in your court, the instances which any of us can recall in which we have suffered defeat are very rare indeed, where we have not, on reflection, been compelled to acknowledge the correctness of your decisions; and in no case have we ever had occasion to doubt your perfect impartiality and conscientious discharge of duty.

We have, by our long and intimate association with you, ceased merely to respect and venerate you as a judge, but we have also learned to love you as a friend. Your departure from us, therefore, involves much more than the ordinary consequences of official change. The loss to the bench may be supplied, and the wheels of the law revolve as

before, but the severance of the closer ties which unite us is irreparable.

There could be no more fitting occasion than the present one of leave-taking, for us to assure you that nothing has ever occurred in the administration of your official duties in this district, or elsewhere in your circuit, which has in the slightest degree abated that perfect trust you early inspired, and which time has ripened into faith.

> "We've seen the actions of your daily life
> Scann'd with all the industrious malice of a foe,
> And nothing meets our eyes but deeds of honor."

It is gratifying, however, to know that the step you have decided upon does not wholly withdraw you from the profession, but merely changes the sphere of your usefulness. We hope to share the benefits of your labors in many valuable contributions to the literature of the law, which your learning, experience, and the dignified repose which will attend your future duties, will so eminently qualify you to produce. We congratulate the bar of the future on securing so competent an instructor.

No word that we can utter could add anything to the high compliment which has been paid you by the venerable institution which has chosen you to fill one of the highest places in its bestowal. The bar of the whole west will feel honored in your selection, and will take pride in your success.

We bid you an affectionate farewell, and assure you that the best wishes of the whole bar of Minnesota will always follow you, wherever duty or pleasure may call you.

CHARLES E. FLANDRAU,
JOHN B. SANBORN,
GEORGE L. OTIS,
GEORGE B. YOUNG,
HARVEY OFFICER,
} *Committee.*

After reading the address, which was richly engrossed in a handsomely ornamented morocco case, it was handed to Judge DILLON by Judge FLANDRAU, who then continued:

Allow me to present to you an engrossed copy of the address, with the compliments of the bar of the state. I am also commissioned to move his honor, Judge NELSON, on behalf of the bar, to allow the address to be entered upon the records of the court, which motion I now make, and ask that it may be granted.

In support of the motion, the following addresses were made:

ADDRESS OF MR. DISTRICT ATTORNEY BILLSON.

Mr. BILLSON made the following remarks:

The address to which you have listened, Judge DILLON, portrays only in subdued colors, I am sure, the sentiment, not too strongly expressed

by the word sorrow, with which the bar of Minnesota have contemplated your withdrawal from the judicial office.

So long, so rich, and so varied has been your experience as a minister of justice; so unremitting has been your industry; so ardent and exclusive your devotion to the law; so high have been your professional ideals, and so conspicuously conscientious and disinterested your pursuit of them, that, in our minds, the blind goddess and her scales are scarcely more intimately associated with the judicial function or more emblematic of its unerring discharge.

I think I shall only give voice to the common experience of our bar, when I say that the opportunities we have enjoyed of observing your ample learning and your skilful methods in the dispatch of business have been the most stimulating and highly prized of our professional privileges.

The patience and circumspection with which you have been cheerful to listen and inquire; the rapidity with which you have grasped, and the tenacity with which you have remembered, the most intricate statements of facts; your quickness to apprehend an argument of counsel, and to further illustrate its correctness, or to expose its fallacy; your happy combination of capacities for the widest generalization and for the most detailed and discriminating analysis; above all, the benevolent solicitude, the consummate skill, the sound discretion, and frequently the splendid success, with which you have ever striven to avert that sometimes inevitable but always deplorable catastrophe, an incompatibility between fixed principles of law and the equities of a particular case — all these are salient features of your official character, as we have learned it and loved it during ten years of professional contact, and as we shall bear it with us in perpetual remembrance.

It has been your good though arduous fortune to preside over a circuit imperial in extent, resources, and variety of industrial pursuits — skirting, as it does, the Mississippi from its source almost to the gulf, with its western confines resting on the mountains. Vast and various as the ordinary litigation of such a circuit must have been, its dignity and difficulty during the last decade have been enhanced by three convulsions which have successively afflicted the several portions of your circuit. You have been called upon to administer upon the wreck of the confederacy in the south; upon the bankrupted railroad corporations in the north; and in the central part of your circuit upon the most formidable conspiracy against the public revenues which has been known to the new world. I refer to the late unlamented whisky ring.

Your decisions upon the grave and often novel questions thus precipitated on your court, have been perused with admiration by the profession throughout the country, and, with a gratifying degree of confidence, are everywhere cited as authority by bench and bar alike. In a word, you have made solid and fame-worthy contributions to the noble science of the law, upon which have labored the closest thinkers of

many ages, and which, with all its imperfections, is one of the finest creations of human reason. As representing a department of the public service co-ordinate and intimately associated with that from which you are about to retire, I wish before closing to give brief expression to the sense of loss which I know will be keenly felt throughout all branches of the federal service upon the retirement to another field of labor of one who has been confessedly among its brightest ornaments, and who has added new lustre to the already illustrious name of the federal judiciary.

MR. C. K. DAVIS' ADDRESS.

Governor DAVIS said:

JUDGE DILLON:—The bar of this state received the announcement of your resignation with expressions of regret more touchingly eulogistic than words can here express, with due regard to the formality of this proceeding.

Men of sensibility will not say in his presence concerning a person who is the object of their affection, nor can such a person hear without embarrassment, those words which fully satisfy the feeling which prompts them. History, even though it speaks with the voice of friendship, does not say, and cannot say, to him all that absence and the future will require.

This bar cannot, however, forego the opportunity of this sad moment of parting, of this moment which gathers up into the heart its full sense of the fact that we are to stand before you as a judge no more, to cause you to feel how great is our esteem for you, how great our deprivation is.

It so happened that we urged your appointment as circuit judge, many years ago. Of the many eminent names which were under consideration for that nomination, your own was preferred by us, not for any personal reasons, because few of us then enjoyed your acquaintance. We had, however, become familiarized with your judicial character by frequent applications in our courts of your decisions as judge of the supreme court of Iowa, and we were guided to our preference by them. We found in them learning always more than sufficient for the case; intellectual vigor, to which that learning was an armor, not an incumbrance; mental independence creative in its character; a judicial conscience which dealt with the case and not with its consequences.

With these, our prepossessions, you came to us, and there is not a member of this bar in whom they have not passed into convictions which are adorned and made forever beautiful by an abiding love and esteem for those personal traits which experience only can teach, and which absence cannot destroy or even dim.

The resolution which you have taken, while it grieves, does not surprise us. There are limitations to all endeavor and ambition, and surely the administration of the laws of seven commonwealths, which hold six

millions of people, which present diverse institutions, codes which, though perhaps analogous, are yet so different as to perplex; where civilization and empire are so visibly overspreading a region where Terminus has not yet set up his landmark; where a legal system must be created in a few years which will survive when the erasing finger of time has made illegible the decrees which establish it; surely these are boundaries which circumscribe the greatest capacity and resolution. It was for you, and not for us, to say when you should pause. It is our gain and your glory that so much of this vast work has been done. It will not pass away. It will endure in precedents, guiding human concerns when all recollection of us is lost.

It is due to you to speak of one act of your judicial career which has benefited this state and is appreciated by our people more, perhaps, than has been signified to you. The financial catastrophe of 1873 afflicted us deeply. It left our future unsecured. Our great railway system, which had been projected and partially constructed towards the British possessions, was paralyzed at the moment when consummation seemed very near. The land grant depended upon the completion of the enterprise, and it was not easy to see how this could be done in the war of disappointed and clamorous interests and in the debility of bankrupt corporations. But in this court the expansive and administrative forces of the system of laws here administered were fully proved. The settlement of private right was made instrumental to the public good, and both private right and public good were perfected and increased. The road was built, the lands were earned, the frontier was advanced, and the homes of thousands stand to-day where we feared the wilderness would be supreme for many years. By this the court has earned what courts seldom receive—the gratitude of a people for a judicial act.

Our regret at your retirement from the bench would be greatly increased were we not assured that the new field of usefulness to which you have been invited affords an ampler verge for what you would necessarily have continued to contribute to had you remained in your present office.

It has become apparent that our system of laws some time ago arrived at that stage of complexity and contradiction of precedent which demands a reformation and second growth. The time, which we can all remember, has passed when an authority in point, exhumed by mousing industry, was a kind of fetich before which judges bowed and opposing counsel were dumb. Principle, so long suffocated beneath the mass of cases, has been compelled to rise and to remit them to their auxiliary places. This is a time like those when the great civilians were ordered by Justinian to formulate the immense mass of the Roman laws; when commerce and extending empire compelled MANSFIELD to project by a continuous judicial travail of thirty years the commercial code of all English-speaking people; when the failing feudal abuses,

vicious in their last extremity, compelled D'AGUESSEAU to remodel the law of France. These works were done by judges. The work soon to be done in our day must principally be done by judges. We hope and expect that in your new vocation you will continue to contribute powerfully to that great result, which is destined to condense and make more certain and symmetrical our cumbrous jurisprudence.

Nothing more remains for me to say, except to assure you of an abiding esteem, affection, and respect, and to hope that in all stations to which you may be called, your evening of life may be made pleasant by honor, love, and troops of friends, and by the gladsome light of jurisprudence.

MR. GORDON E. COLE'S REMARKS.

MAY IT PLEASE YOUR HONOR:

In rising to express my cordial concurrence in the sentiments of the address of the committee, I know that I but give utterance to the universal expression of the bar of the district. The announcement of your determination to withdraw from the very arduous duties—none more so, I believe, in the world—of the judge of the eighth circuit, has elicited an unanimous expression of regret such as has rarely greeted retirement from judicial office. The patience and painstaking with which you have ever sought to solve the most difficult problems of both law and fact; the wisdom with which, under your administration, the harshest and most technical rules of the common law have been attempered by equity; the ripe legal learning and felicitous language which has enriched and adorned your judicial decisions; the uniform kindness and courtesy which has characterized the intercourse of the bench with the bar, have endeared you to the bar of this district in a vastly more than common degree. Every country and state has, or has had, its golden age of the law, to which the profession loves to recur. The era of MARSHALL in the nation, of KENT in New York, of SHAW in Massachusetts, of GIBSON in Pennsylvania, of MANSFIELD in England, and of your honor's administration in the eighth circuit, were all such periods, and will alike be remembered as luminous epochs of judicial history.

You go from us to enter upon a more remunerative and less laborious field of labor, clothed as with a mantle with our heartiest wishes for your abundant success, and followed by our profoundest regrets for the step which robs us of a judge whom we can love, honor, and respect, and the bench of one of its brightest ornaments.

MR. THOMAS WILSON

followed with these remarks:

MAY IT PLEASE YOUR HONOR:

I wish only to add a word. What one of us on this occasion says, is but the echo of what every other feels. Though it is but recently that you first came among us, we feel your loss as almost irreparable.

Never before have I known a judge to secure, or, as I believe, deserve, more unreservedly and unqualifiedly, the admiration, confidence, and affectionate regard of the bar. You have come up to, yes, elevated, our most exalted ideal of a great and good judge, and at the same time you have bound us to you by a friendship that will be as lasting as our lives. Wherever you go our friendly eyes and hearty benedictions will follow you. I hope our loss may be your gain; that your afternoon of life may be cloudless, and your friends in your new home be as hearty and true as those who to-day so much regret to be compelled to say good-bye.

At this point, during a brief pause in the proceedings, Judge NELSON inquired, "Is there anything further, gentlemen?" and receiving no response, Judge DILLON himself said:

JUDGE DILLON'S RESPONSE.

GENTLEMEN OF THE BAR:

The address of the bar of Minnesota, and the remarks which have accompanied its presentation, fill me with sentiments of gratitude which any poor words of mine can but inadequately acknowledge and express. Nearly ten years ago I came to this city, bringing with me my commission as judge of this circuit. I was personally unknown to the entire bar of the state. You received me with characteristic cordiality and warmth. Since then I have attended nearly every term of the circuit for this district, and the relationship thus created has been to me one of uninterrupted satisfaction. You will, therefore, readily credit me that your public assurance that the relation has been satisfactory to you, and that you view its termination with regret, cannot be otherwise than extremely gratifying to me. We met as strangers, and I beg to say that no part of your address gave me such real pleasure as the assurance that we part as friends.

It has fallen in the line of my duty to decide, in connection with my learned associates, many causes involving large interests, some of which have excited warm feeling and have been conducted with zeal, and in which the result must at times have disappointed counsel as well as suitors. Yet, such has been the uniform respect and confidence of the bar, that, so far as I know or believe, my judgments have left no wounds which did not readily heal without a scar.

You have been pleased to refer to my official conduct and decisions in very complimentary terms. I cannot but feel that this is largely due to the partiality of friendship. It is fitting that I should acknowledge that for whatever praise I may justly merit in this respect I am largely indebted to the wise counsel of my associates, and to your ability and learning. Fortunate is the judge who has the enlightened aid and the steady support of such a bar as I have been accustomed to meet at every term in the state of Minnesota.

He who holds the office of judge of this circuit, holds a place of great responsibility and great difficulty. He who discharges all of its varied and exacting duties must shun delights and live laborious days. No man's unassisted judgment is equal to the work, and I feel that my obligations to the bar are far greater than theirs to me. I am your debtor, you are not mine.

You refer to the new field of labor which I am about to enter. I forbear any extended allusion to it, and will only say that the action of the venerable university in coming to this remote circuit in the west to fill a chair in the institution which, with pardonable pride, points to the lectures of Chancellor KENT, delivered therein fifty years ago, could not have been more of a surprise to you than it was to myself. The increased leisure it gives, the nature of the duties it requires, the compensation it affords, and the great opportunities, direct and collateral, it presents, combined to convince me that I ought to go. I do not seek it for a life of inglorious ease, but that I may the better be enabled to discharge that debt which Lord BACON says every lawyer owes to his profession.

Our official relations are practically dissolved. This is my last regular term. In this parting hour I love to contemplate you, not simply or chiefly as the trusted counsellors of the court, but as an assemblage of my friends. The bar has always been my constituency. I claim no merit but a strenuous and well-meant endeavor to discharge all my public duties. The regard and respect of the bar is the only reward I have coveted, or now prize. I bear with me nothing but the most pleasant memories. I carry away nothing so priceless as the public and impressive expression of the esteem in which I am held. I part from my faithful and generous associate—I part from you all—with tender regret. The reflection saddens me that as a judge I shall never again visit your beautiful city and prosperous state. But I shall never cease to think of you with affectionate kindness, and shall always regard my relations to you as among the most fortunate circumstances of my life. I hesitate to speak the sad word which makes me linger, but which must needs be spoken—farewell—and may the good Father of us all have you in His holy keeping.

REMARKS OF JUDGE NELSON.

Judge NELSON closed with the following remarks:

I cannot permit the occasion to pass without expressing my hearty concurrence in the sentiments of the bar, uttered in such fit and appropriate language.

The judicial circuit sustains a great loss by the retirement of Judge DILLON from the bench, of which he has been so bright and conspicuous an ornament. It is a great loss to us all.

As a friend and an associate for the past ten years, engaged in the

common pursuit of administering justice in this district, I shall mourn his absence from the stated sessions of the court, and lament the loss of his counsels. His open, frank, and genial manners; his judgment, so well ripened; his learning, so varied, so extensive; and, above all, his love of truth and justice, so keen and instinctive, secured my respect at the outset; and I ever found I could rely upon his opinion with a confidence in its correctness which is rarely experienced.

I will not speak of our social relations, which have been so pleasant and agreeable, but cannot forbear thus publicly acknowledging my esteem for him as a man, and my high appreciation of his services as a pure, just, and impartial judge.

I have known him better than you have; my opportunities have been greater, my associations more intimate. Where you have seen the mature and well-considered judgment, I have witnessed the extensive research, the untiring labor, and the zeal for the truth brought to the investigation of difficult questions of law and fact. I entertain towards him the warm affection of a brother, and part with him, as we all must, with deep sorrow. It is very gratifying, however, to know that he enters a new field of usefulness, which he is well adapted to adorn, and where he will have ample opportunity to elevate and ennoble our profession.

My best wishes go with him. May he be spared to continue his useful life, and may the bond of friendship cemented during his official connection with the court in this district remain unbroken in the future.

The request is eminently proper, and these proceedings will be spread upon the minutes of the court. It is so ordered.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT FOR KANSAS, NOVEMBER 29, 1877, IN HONOR OF THE LATE HONORABLE WILSON SHANNON.

Mr. GEORGE R. PECK, United States district attorney of Kansas, who had been selected by the bar of the state to present their resolutions to the court, said:

PRESENTATION OF THE RESOLUTIONS OF THE BAR OF KANSAS.

MAY IT PLEASE THE COURT:

The bar of the state, honoring the memory of him who was for many years their leader, have adopted resolutions expressive of their sorrow at the death of WILSON SHANNON. In their name I present those resolutions, and ask that they be spread upon the records of the court. Did it not seem strange to your honors, as you entered upon the business of the term, to miss from this throng of lawyers that kindly, honest, rugged face so familiar to court and bar? None of us can have forgotten how he came to the last term, at Leavenworth, looking pale and feeble, but with that same pleasant, hearty manner that he always wore. More than one remarked regretfully, "the old Governor is failing." It was true! His work was almost done. I cannot speak of him merely as a lawyer, though for more than fifty years he was an honored member of our profession. I can only think of him as a friend, kind and faithful, always ready to grant a favor or forgive a fault. The old man kept to the last the fresh and hearty good fellowship of youth. How free he was from the vices of small men, affectation, envy, petty jealousy, and mean ambition, we can all bear witness. How good he was to the boys, the young men just beginning to learn what he forgot forty years ago, when we thought we could make lawyers of ourselves by ingeniously raising questions which were not in the case. He used to tell us kindly, but with an emphasis peculiar to himself, that the court would pay no attention to our subtleties, but go straight to the merits. He was distinguished for that crowning glory of a lawyer—common sense. He loved the law, and I have heard him say that if he had his life to live over again, he would never accept any political office what-

ever. Doubtless, in his younger days, he enjoyed the intellectual struggles of the platform and the stump, for it was not his nature to be neutral on any question. But his autumn was serene and peaceful, filled to overflowing with that which should accompany old age, "as honor, love, obedience, troops of friends," the evidence and the reward of a noble man.

The following are the resolutions adopted:

"The Honorable WILSON SHANNON having departed this life since the last term of the supreme court, the members of the bar of the state have this day assembled to record their profound sorrow at his death and their great regard for his memory.

"He was for fifty years in the almost continuous practice of his profession. The interruptions of professional labor were to discharge the duties of governor of a state and a territory, minister to Mexico, and member of congress, and into these high places he carried that great fidelity he gave to his client, and labored earnestly for the public good. For twenty years he has been the senior of the Kansas bar in years, practice, and ability, and during all this time his never-failing courtesy to all, and especially the juniors at the bar, had won for him the esteem, admiration, and good will of every lawyer in our state.

"*Resolved*, That the members of the bar of the state of Kansas sincerely deplore the death of Honorable WILSON SHANNON, and will affectionately preserve and remember his many virtues as a man, and his great qualities as a lawyer.

"*Resolved*, That the supreme court of the state, and the circuit court of the United States for the district of Kansas, be requested to direct that these proceedings be entered upon its minutes, and that the secretary transmit a copy thereof to the family of the deceased, with the respectful assurance of the sincere sympathy of the members of this meeting."

ADDRESS OF CHARLES W. BLAIR.

General CHARLES W. BLAIR, after some preliminary remarks, proceeded substantially as follows:

A man's life is crowned and completed only by his death. A career can never be accurately judged or estimated until the actor has gone to the bosom of our great mother earth. In the grave there is no work, and no device; but therein and thereby are the fullness and perfectness of all work, and all device.

Death, too, is the most solemn moment of life. The scales of prejudice, short-sightedness, and "infirm judgment" are stripped from the eyes by the skeleton fingers of the grim shadow; and in one brief but supreme instant is realized all the glory and emptiness of life—the vanity and nothingness of its ephemeral achievements and ambitions, and the immeasureable worth of that fitting preparation, whether of

action or endurance, for the shadowy and fathomless beyond, in which the eternity of life is wrought and perfected.

In one sense death is but the extinction of a feeble and fitful taper, the snapping of the slenderest thread, the disarrangement of a curious mechanism by the stoppage of the faintest pulse-beat; but in another it is the threshold of a higher life, filled with the noblest aspirations and enjoyments, brightened and deepened with the ages by an ever-increasing glory, such as not even the wildest imagination, when laden with the "fetters of the flesh," can comprehend.

But in the hour of agony this brings no consolation to the living. The mourners still linger around the half-closed grave, the gloom yet hangs over the dismembered circle by the hearth-stone, and the shadows will not depart from the lives and hearts of friends and kindred.

It has been beautifully said that the sorrow for the dead is the only sorrow from which we refuse to be divorced. Every other sorrow we seek to subdue; every other affliction to forget; but we cling to this in proportion to our love for the departed, until anguish is softened into sadness, or melancholy deepens into pride. In the death which the resolutions and these proceedings are designed to commemorate, there are many considerations to alleviate as well as ennoble our grief, when the sharp wrench of sudden separation permits us to regard them calmly.

Wilson Shannon was of the proud, unescutchioned nobility of nature, cast in the heroic mould of the antique, and of the full stature of the highest manhood. Born with the birth of the great state of Ohio, the history of which he illustrated and adorned for many of the busiest years of a remarkably active life, he seemed to have imbibed its youthful vigor and been endowed with its giant strength. Cradled in the cathedral aisles of its primitive forests, and educated in endurance by the stubbornness of its unyielding hills, the grandeur of nature formed an essential element in that education which precedes books and schools, and is such an important factor in the formation of individual character.

The sturdy struggles of pioneer life, the surmounting and overriding the obstacles which adverse circumstances placed in the pathway of aspiring resolve, fostered still further that rugged and obstinate determination which in after life won him so many triumphs, and wrought into his brain the motto, "*there is no such word as fail.*" And with this motto he fought his way upward. His battle-flag rent and torn in the struggles through which it passed, but there was no stain on his spotless shield, when he stood conspicuous in the galaxy of great names which of old rendered the state illustrious.

He was contemporary and competitor, either in politics or at the bar, of Ewing, Hamer, Allen, Corwin, and Stanberry, although of an older generation than Thurman, Raney, Pendleton, Vallandigham, and Pugh If he had not the legal learning of the elder Ewing, he yet had a

great aptitude for the rapid acquisition of legal knowledge upon a given point that largely supplied its place. Without Allen's inexorable logic, or his general knowledge of books, he had that strong dominant common sense which supplies the place of culture, is the unsparing foe of sophistry, and nearly akin to genius. Not even aspiring to the marvellous oratory of Corwin, who moved his audience to tears or laughter at his will, swaying them to his mood as by the stroke of the enchanter's wand, he yet had that mysterious and wonderful quality which always places an audience *en rapport* with the speaker, makes it see with his eyes, think with his thoughts, by means of which he pervades it with his own personality, and which, for want of a better name, we denominate magnetism. And this fact is another illustration of the aphorism of Aristotle, that "definitions are the sources of all knowledge."

Without Hamer's patient and profound knowledge of men, or Stanberry's subtle scholarship and keen power of analytical reasoning, he had that over-mastering resolve which overrides opposition, and wins by the calculated rashness and desperation of the "forlorn hope" in battle. And in many respects he was the peer of all the generation that followed him.

Thrown naked into the world in any age, he would have been a man of mark. Flung into the Roman amphitheater as a gladiator, he would have triumphed by the sheer force of his pluck. He would have gathered laurels and achieved victories as a Roman general, in virtue of that very magnetism by which "man masters men," and makes them subservient to his stronger will. As a ruler of states, he would have been renowned by that strong and self-adjusting common sense which is far above diplomacy or statecraft, and which stamps the possessor of its highest type as a "born king of men." Carlyle said he could tell by the way a man whistled how he would fight. If there be anything in this save mere pedantic assertion, the author certainly intended to restrict it to the type of men I have referred to, and to declare thereby that everything they do is done in such a masterful way as to show that they are of the material from which monarchs are made.

Inflexible resolve and sturdy common sense were the marked characteristics of the man, and if the union of the two does not comprehend genius, it makes up something above and beyond it. If genius be the "capability of making effort," as defined by Bacon, he had it in its highest development—as his long life was one of unremitting industry and indefatigable labor. Burke defines it to be "common sense intent on new ideas," and in this view his life was an illustration of its exercise. Lord Beaconsfield intimates that "youth is genius," but how much grander and nobler is age, with its equable and majestic strength, tried in the furnace of toiling years, and being to youth as the sweep of the broad river to the thousand noisy torrents that

lie buried and voiceless beneath its unyielding bosom. If genius be invention, and talent execution, as has been happily said by some one, then the toilers in intellectual realms are the men of talent; and to this classification must our lamented friend be assigned. The pressing duties of active life leave no holiday from mental labor to be dissipated in the opium dreams of genius. *They* belong to the realm of cultivated leisure, and are the heritage of the happy few exempted from the effects of the primal curse, "*In the sweat of thy brow shalt thou eat thy bread.*"

But, however we may define and classify his mental capabilities, the fact is still patent that his great characteristic was *power*. His moral force was as irresistible as the mountain torrents of his ancestral clime, and as placid as the river that bears his name.

His successes were the outgrowth of this force. Public position crowded itself upon him, until in the annals of the nation and of two states his name became famous. But it is not his political triumphs that I desire to chronicle. It is not with the detail, but the lesson of his life that I wish to deal. The one is emblazoned in the history of his time; the other, though written there, too, needs the open sesame of analysis to render palpable to sight and touch—*and that lesson is purpose and resolve.*

He was one of the few men in the country distinguished both in politics and at the bar; and his unsparing force won him his ascendency in both—coupled with an unflagging industry that knew no rest and sought no relaxation. In age, as in youth, he was still a student, and in his latter years he was as busy and laborious as in his early and ambitious manhood.

He was also endeared to his brethren of the bar by a tenderer sentiment than pride. Gentle and courteous to all, he yet had always a warm, personal interest in merit struggling against obstacles; and many a kindly word, spoken at the proper season, has dispelled clouds almost overwhelming from the horizon of the youthful aspirant to forensic success, and rendered his toilsome labors less intolerable. His heart yearned for the unfriended youth, who, with "Excelsior" for his motto, was struggling up the flinty pathway of professional endeavor, and in thousands of instances, perhaps, the earnest and warm sympathy of the old warrior who had won the goal has smoothed and softened the rugged journey.

His blood warmed to every lawyer of desert, and an outstretched hand never appealed to him in vain. Good deeds, kind words, charitable thoughts, marked his professional associations, and at the bar, in this state, we may not look upon his like again.

I have read somewhere the beautiful conceit that no note of music once awakened into being is ever lost; but that all are still wandering over the earth, impalpable to mortal sense, because their tuneful utterances are too faint and vague to be seized by the organs of the flesh;

and that when our ears are refined into spiritual acuteness by the great change called death, all these harmonies will at once burst upon us with divine, inextinguishable, and almost overwhelming melody. Is it not true, also, of good deeds and kindly words? Their work lives after them. Their influence is felt when they are long forgotten. They shape destinies unconsciously to those affected, and undreamed of by those who do and speak them. And after the great change, will they not be known and read of all, emblazoned in the wondrous firmament of "that realm where the rainbow never fades," shedding their own divine radiance and splendor upon him who gave them birth from the warmth and catholicity of his yearning human affection? And if this be true, what a galaxy of stars will be set in WILSON SHANNON'S coronet of glory!

But there is another and even kindlier aspect to his character. Who shall paint the domestic virtues of this man of iron and granite? Who shall tell of the tender and devoted husband, the kindly and loving father, whose sunny temper and genial presence had magic power to drive care from the household and gloom from the hearth-stone, brightening and warming them with the glow of an unuttered and inexpressible tenderness, like some wandering perfume from the Eden lost of old? Let the bitter sobs and breaking hearts of the bereaved ones answer.

For us, let us profit by the legacy that his honorable career has left us. Though the echoes which his voice have heretofore awakened in this court are mute henceforth forever, let that voice still speak to our inner consciousness, exhorting us to high thoughts, good deeds, and manly resolves.

His epitaph, more enduring than bronze or marble, is the love and veneration of his brethren; and, from his honored grave, let us turn to our professional labor, thankful for his high example, and rejoicing that "such as he have lived and died."

He is "well healed of the sharp malady of life," and, after its fitful fever, sleeps well.

THE ADDRESS OF MR. JOHN P. USHER.

MAY IT PLEASE THE COURT:

I will not allow this occasion to pass without offering some tribute of respect to the memory and character of the distinguished citizen whose fame we would all gladly perpetuate.

Governor SHANNON occupied exalted public positions for nearly a quarter of a century, commencing as governor of Ohio, in 1837, and concluding his public career as governor of Kansas, in 1856, more than twenty years ago. There are not many who have observed him in the peaceful pursuit of his honored profession in the last twenty years of his life who are conscious of the many wonderful events that transpired

and were witnessed by him during his early life, or even of the scenes or events that occurred during his official career.

At his birth, which occurred in Clermont county, Ohio, February 24th, 1802, Ohio was yet a territory, with a population, as shown by the census of 1800, of less than fifty thousand inhabitants. It was scarcely more than a hunting ground. The territory was then largely in the possession of the Indians, and till the close of the war of 1812 was the theatre of savage warfare. Population increased but slowly, and its advance west into the Indian country was attended with unspeakable difficulties and dangers. In the midst of warfare the people had but slight opportunities to establish schools for their children, but SHANNON was of a family of such indomitable will and energy that they overcame difficulties to most people insurmountable, and he was enabled to attain a thorough education, partly in the college established after his birth at Athens, in Ohio, and partly at the Transylvania University, in Kentucky. After completing his collegiate course, Governor SHANNON adopted the profession of the law, and immediately attained success and honorable reputation.

In 1835 he was made prosecuting attorney in Ohio. So rapidly did he advance in distinction and favor, that in 1837 he was by the democratic party elected governor of his native state. Two years afterwards he was renominated by his party for the same exalted position. THOMAS CORWIN was his competitor, and was elected over him. It was the memorable log-cabin and hard-cider campaign of 1840, now passing rapidly into history, in which General HARRISON was elected president. Though SHANNON'S career as governor had been faultless and eminently conservative, and although no substantial objection was or could be made against him, it was impossible to withstand the *furore* created in favor of General HARRISON, who had fought the Indians at Tippecanoe and the British at the Thames. Governor CORWIN, the senior of SHANNON, had been in the war, and was, without disparagement to any one, generally regarded as the most accomplished orator of his time. The lofty bearing of Governor SHANNON, his irreproachable fame, and his sturdy resistance to the excitement of the hour, were ineffectual. General disorder and hard times prevailed throughout the land. The banks had suspended specie payments. The suspension was believed to have been brought about by the famous specie circular of General JACKSON. The satirical cry was, "Gold and silver for the office-holders, and rags for the people." The campaign songs of GRENIER were everywhere sung, and the democratic party was overwhelmed. Yet, two years afterwards, Governor SHANNON was again nominated by his party and triumphantly elected over Mr. CORWIN. The contests of Governor SHANNON with CORWIN show that SHANNON at that time must have been no indifferent orator. Oratory was then much cultivated, and with the best the people were most certain to be captivated. It appears to me that the art of speaking, so much cultivated forty years ago, has been

in a great degree neglected in the last few years. There are apparent causes for this—most prominent, the telegraph. In reflecting upon the characters of those we have known and who have passed away, our minds lead us generally to consider what special good they have accomplished, rather than to dwell upon those qualities which might be considered purely ornamental. Those of us who respected and revered Governor SHANNON remember with pleasure his career while governor of Ohio. His conservative counsels, his opposition to all radical action adverse to the prosperity of the state, his support of the system of internal improvements, his resistance to all attacks upon the credit of the state or upon its institutions, has left a lasting impress upon the minds of the people. In all, the people of Ohio may look back to his administration with pride and satisfaction.

One of the leading characteristics of Governor SHANNON was to do good to his fellow men. I will be excused for referring to a conversation with him respecting his career as minister to Mexico. When he reached the capital of that country, in 1844, he lost no time in impressing his character upon Santa Anna, then governing there. His great object was to obtain such influence over that chief as would induce him to grant such reasonable requests as he might make. In that, he told me, he lost no time. He said, "When I gained that, I applied for the release of the Texas captives of Mier and of the Santa Fe expedition, confined in the castle of Perote." He said Santa Anna agreed to let them go, and he made all haste to the castle to announce to them their deliverance and witness their departure. He said he did not remember any incident in his life that gave him more joy.

The people of Ohio always manifested the greatest confidence in him. That confidence was no doubt heightened and strengthened by the fact of his undeviating firmness in his political faith, never vacillating or making captious objections to the fairly expressed will of his party. In congress, in 1855, he voted for the Kansas-Nebraska act, and was soon thereafter appointed governor of the territory of Kansas. It was doubtless supposed by President PIERCE, who appointed him to be governor, that because of his urbanity, and of his fame as governor of Ohio, he would be enabled to tide the territory along in peace until it should be admitted as a state. But a majority of his party, then in the ascendant, desired and intended that Kansas should become a slave state. The facile administration made exactions of Governor SHANNON revolting to his conservative nature. Though always a strong party man, he found himself incapable of carrying out all its behests. He strove for peace and for the exercise of the popular will. But the administration, seemingly unconscious of the deep feeling that was welling up all over the country, impatient with Governor SHANNON because he could not control the violent and keep peace where there was no peace, removed him. Those who knew him best knew that it was his ardent desire to promote, in harmony, the welfare of the people of the territory. He strove to rec-

oncile differences and to heal discord, but all in vain. Cruelly suspected by both sides to the controversy, all his efforts were paralyzed. Yet he had the satisfaction of remembering, as do his friends who survive him, that when the territory was invaded and an immediate conflict of arms threatened, he had the address to bring about a truce whereby the Missourians should retire from the territory, and that he with firmness required the truce to be observed. This occurred at the approach of winter, and many of the old settlers remember their fears of that day and the horrors to which they would have been subjected but for the action of Governor SHANNON.

Since he ceased to be governor until his death, he devoted himself to his profession. In the Quantrell raid, his office was burned and all his books and valuable papers were destroyed. It was a loss keenly felt by him, and one that he was never able fully to repair.

In contemplating the career of Governor SHANNON only as an actor and observer, we are to consider that while a citizen of Ohio he witnessed an increase of its population to a million and a half by the time he was elected its governor, and to more than two and a half millions when he ceased to be a citizen of the state. He first saw Ohio a wilderness; he left it teeming with population and commerce, and dotted all over with towns and cities.

He came to the territory of Kansas and united his fortunes with a population of some few thousand people—dying twenty years afterward amid a population of seven hundred thousand souls, with common school houses, colleges, universities, and churches everywhere in view.

To-day our minds are directed to him and his career as a lawyer. As such, Kansas is most indebted to him. Always attentive and constant in his duties, his example to others, and especially to the younger members of the bar, has been of inestimable value. His urbanity and lofty bearing, exempt from all violence of either conduct or expression, has left its impress upon the bar of the state. If I were to say what I think were his leading and most positive characteristics, and which I think embrace nearly all the virtues, they were his absolute ingenuousness and strict regard for truth. He scorned and loathed hypocrisy and falsehood. No one has, nor do I believe any one ever will say, with the expectation of being believed, that Governor SHANNON ever deceived him.

As has been said of another, "Although gifted with talents of a very high order, he had none of the irregularities or eccentricities of genius. There was a remarkable harmony in his mental powers and of his habit of thought and conduct. His intellectual efforts were not fitful and intermittent, but steady and persistent, and he gave to everything its proper place—professional efforts, domestic duties, attentive to his friends and devoted to his duties as a citizen."

We know he was engaged in nearly all the important causes in the state, and was deservedly acknowledged to be the head of the bar.

Although it had been apparent to his family and friends for some weeks before his death that he was failing in strength and must soon yield to inevitable fate, still he attended to his professional duties until within a few days of his death; and though his failing health and strength were noticed, neither family nor friends supposed his end so near, but when it came it found him in full possession of all the faculties of his mind, and he met death without the shadow of a fear, and with all that serenity and dignity which had ever marked his life.

RESPONSE BY THE COURT — JUDGE DILLON.

GENTLEMEN OF THE BAR:

The late WILSON SHANNON was honorably connected with the history of the country. But, unlike many public men of our profession, he was never entirely or permanently withdrawn from it. He was always a lawyer, and continued in active practise to the last. It is fitting that the bar should mark, in this public manner, the death of one of their number so distinguished and so worthy.

The judges of this court, in which he constantly practised, and who knew him well, concur with the bar in the high estimate which they have placed upon his talents and his character. We, too, miss his venerable presence in this tribunal. We, too, have lost the benefit of his ripe learning, wide experience, and wise counsel. But it is vain to deplore his loss. His life was extended beyond the ordinary span. His record is complete. That record remains to us and is ours. You may be pardoned for proudly pointing to it, as you have done, as a record without a blot or blemish — as a record which is at once a consolation and an example.

His course was finished. The fulness of time had come. The golden bowl is broken. The silver cord is loosened. The worn-out clock has ceased to tick, and we stand in the profound and awful silence. With heads reverently bent, and with saddened hearts, we bow to the decree of the unerring Judge. His survivors of the bar from all parts of the state of his adoption, which he loved so well, are here gathered together in this court, so accustomed to his presence, and our eyes are turned towards the western horizon, where his sun so lately went down. But it is out of sight. We shall behold it no more, and even the vanishing splendors which it left behind fade upon our vision even as we gaze.

We accede to the request of the bar and will order that their resolutions be entered of record, and that the court be adjourned for the day.

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1. RELATION OF PRINCIPAL AND AGENT.—The ordinary relation between a banker and his customer, as respects money deposited by the latter with the former, is that of debtor and creditor; but, on the special circumstances of this case, the relation between the two, as respects a specified sum of money remitted by the banker at the request of the customer to another bank to pay a specified debt of the customer, was held to be that of principal and agent, or trustee and *cestui que trust*, and not that of debtor and creditor. City of St. Louis *v.* Johnson, 241.

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2. *Same.*—COLLECTING AGENT.—A bank, acting as the collecting agent of another bank, has, in the absence of special authority or usage, no right to receive in payment anything but money; if it receives the check of the debtor on another bank, this is conditional payment only, and it becomes the agent of the drawer of the check to receive the money thereon, and until the money is received the payment is not complete. Levi *v.* National Bank of Missouri, 104.

3. *Same.*—RIGHT TO COLLECT AFTER FAILURE.—The defendant bank received from the plaintiffs, their correspondent, a bill of exchange "for collection and credit," and accepted from the drawee his check on a third bank for the amount, and surrendered the bill of exchange. On presenting the check, instead of demanding the money thereon, it accepted its certification as good, and suspended the same day, having previously credited the plaintiffs with the amount. On the day after its suspension it collected the certified check. A receiver having been appointed, the amount, mingled with other moneys, came into his hands. The question was, whether the defendant bank was a general debtor to the plaintiffs for the amount, or whether the money received on the check was held by the receiver in trust for them; and judgment of the court was for the plaintiffs. *Ib.*

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2. *Same.*—ENGLISH DOCTRINE.—Such is the modern English doctrine, and it was followed in the case in judgment. *Ib.*

3. ATTORNEY'S FEES PROVIDED FOR IN NOTE.—An instrument in writing, purporting to be a promissory note, is none the less a promissory note because it contains a stipulation to pay attorney's fees if suit be instituted on the note. Howenstein *v.* Barnes, 482.

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2. *Same.*—RIGHT TO DISMISS BILL AND CROSS-BILL.—The plaintiffs in the original bill in an equity suit have the right, as a matter of course, at any time before decree, to dismiss their bill at their own costs; but where a cross-bill has been filed by defendants and service of process was had thereunder on the plaintiffs, or the latter had voluntarily entered their appearance thereto, then the defendants would be entitled to a decree *pro confesso* on such cross-bill on a dismissal of the original bill by the plaintiffs after the lapse of the time allowed them by the rules to answer. *Ib.*
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CORPORATIONS. See *Municipal Corporations; Factor; Railroad Company.*

1. Liabilities of Stockholders.—Unless prohibited by statute, an agreement between the incorporators of a company and the directors, by which the former convey to the company property needed for the purpose of its operations, and receive payment therefor in full-paid shares of the stock of the company, is, in the absence of fraud, binding upon the parties, and such stock is full-paid stock. Phelan *v.* Hazard, 45. See also, 348.
2. *Same.*—Rights of Creditors to Impeach.—Whether subsequent creditors of the company can impeach such transaction as respects shares of stock which purport to be full-paid shares, when they are in the hands of a subsequent registered transferee for value, and who purchased the same as full-paid shares, relying upon the certificates and the records of the corporation that full payment therefor had been received by the company, *quære?* *Ib.*
3. *Same.*—National Bank.—Under the national banking act, a shareholder has the right to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferrer's liabilities in respect thereto; and, in the absence of fraud, this right is not subject to a veto by the directors and the other shareholders. Johnson *v.* Laflin, 66.

CORPORATIONS — Continued.

4. *Same.*—SALE OF SHARES.—Where such a sale of shares is made, and the transfer entered on the books of the bank, the transferrer ceases to be a shareholder, and is freed from liability in respect of such shares. *Ib.*

5. *Same.*—CONSTRUCTION OF ACT.—The provision of the national banking act (Rev. Stats. sec. 5139), that shares shall be "transferable on the books of the association," construed, and *held* not to give the directors the power to refuse to register a *bona fide* transfer of stock without some valid and sufficient reason for such refusal. *Ib.*

6. *Same.*—SALE, WHEN COMPLETE.—As between the seller and purchaser of shares in a national bank, the sale is complete when the certificate of the shares, duly assigned, with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller; and either the purchaser or seller may compel a registration of the transfer on the books of the bank, unless the bank has some valid and sufficient ground for refusing to register the transfer. *Ib.*

7. *Same.*—WHEN BANK RECEIVER NOT LIABLE FOR MONEY PAID.—The defendant, Laflin, owning full-paid shares of stock in a national bank of which his co-defendant, Britton, was the president, employed a broker to sell the same in the market. The broker, without Laflin's direction or knowledge at the time, sold the same at the market value to Britton, individually, and received in payment his individual check on the bank for the purchase price, and delivered to the purchaser the share certificates assigned in blank, with blank powers of attorney thereon endorsed, authorizing the transfer of the shares on the books of the bank. Subsequently, after the amount of the check had been collected, but on the same day, the president, without the knowledge of Laflin or the broker, directed the book-keeper of the bank to credit his individual account with the amount of the check which he had given for the shares, and to transfer the shares (the book-keeper inserting his own name in the blank power of attorney as attorney to make the transfer) to Britton, "trustee," not specifying for whom he was trustee, and charging the sum to the "sundry stocks account" of the bank, all of which was done. The bank, although it had not committed any act of insolvency, was then insolvent; but this fact was not known by Laflin or the broker: *Held*, That, although the bank, or its officers for it, were prohibited from purchasing its own shares (Rev. Stats. sec. 5201), yet that Laflin, having sold in good faith, without notice of the illegal purpose of Britton in buying the stock, or of his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment for the shares. *Ib.*

COUNTY.

Right to sue county in federal courts cannot be taken away, 414.

COUNTY BONDS.

Authority to issue, recitals, legislation of Iowa, popular vote, defences. See *Municipal Bonds.*

CREDITORS.

1. Attaching creditors. See *Bankrupt Law.*
2. Number and value of. See *Bankrupt Law.*
3. Priority of United States, 275.
4. Right to impeach purchase of property by corporation, 45.
5. Rights of in Corporation.—The petition of a creditor of a company which had become insolvent and dissolved was held not sufficient to open an inquiry into the transaction between the corporators and the company as to the value of the property conveyed to the company in payment of shares, with a view to hold a shareowner for the difference between the agreed value and the actual value of the property conveyed. Phelan *v.* Hazard, 45.

CRIMINAL JURISDICTION.

Of federal courts over Indians, 394.

CRIMINAL LAW. See *Decoy Letters; Obscene Books, Letters, etc.*

1. Conspiracy to Defraud.—The Revised Statutes (sec. 5440), in respect of the crime of conspiracy to defraud the United States, changes, in material respects, the offence of conspiracy as it existed at common law, and every ingredient of the offence must be clearly alleged. United States *v.* Walsh, 58.
2. *Same.*—Indictment Bad for Uncertainty.—An indictment charging an alleged conspiracy to defraud the United States to consist in "certifying that certain false and fraudulent accounts and vouchers for materials furnished for use in the construction of the United States custom-house and post-office in the city of St. Louis, and for labor performed on the said building, were true and correct," is bad for uncertainty. *Ib.*

DAMAGES.

1. Dangerous Excavation.—Injury to Child.—The railway tunnel connecting the union depot in St. Louis with the Illinois and St. Louis bridge was, at a point where it was uncovered, and within the line of a public street, left unguarded, exposing a perpendicular wall fourteen feet in depth below the surface of the street. The petitioner, a boy four years of age, strayed away from his home, about two blocks distant, under circumstances not disclosed by the testimony, fell into this excavation, and sustained a fracture of the thigh bone. It appeared (1) that his parents were poor and

DAMAGES — Continued.

unable to employ a servant to look after him; (2) that he sustained no other injury except physical pain and suffering; (3) that the tunnel was in custody of receivers of this court: *Held*, (1) That the unguarded excavation was a nuisance, the continuing of which rendered the receivers liable to pay out of the fund in their charge damages for any injury of which it was the proximate cause; (2) that the petitioner was in law incapable of negligence, and that the burden of showing contributory negligence on the part of the parents, such as, imputed to the petitioner, would bar a recovery, rested with the respondents. Hagan's Petition, 96.

2. *Same.*—What is no Evidence of Negligence.—The mere fact that a child four years of age strayed a distance of more than two blocks from home, at play with other children, is not of itself evidence of contributory negligence on the part of its parents. *Ib.*
3. *Same.*—Measure of Damages.—Damages may be given in such a case where there is no other substantial element than physical suffering. *Ib.*

DECOY LETTERS.

1. The cases in which it is allowable to make use of decoy letters discussed. United States *v.* Whittier, 35.
2. *Same.*—Act of congress as to obscene literature. See *Obscene Books, Letters, etc.*

DECREE. See *Railway Mortgage Foreclosure.*

Of adjudication in bankruptcy, conclusiveness of, 146.

DEDICATION.

Iowa Statute.—The public square in the city of Council Bluffs held to be effectually dedicated to the public by force of the platting and acknowledgment thereof, and acts *in pais* by the dedicator. Bayliss *v.* Board of Supervisors, 549.

DEED. See *Charitable Trust; Infant's Deed.*

DEFINITION OF "TRADESMAN." See *Bankrupt Law*, 11.

DEPOSITIONS.

In Common Law Actions, how Taken.—In common law actions in the federal courts, depositions may be taken pursuant to the state law or the act of congress, as parties may elect. Flint *v.* Board of Commissioners, 481.

DISAFFIRMANCE.

By minor of conveyance. See *Infant's Deed.*

DISCHARGE. See *Bankrupt Law*, 8, 11.

DISTRICT COURT. See *Bankrupt Law; Jurisdiction.*

DOMICILE.

WHAT CONSTITUTES.—Actual residence in a place, with the intention that it is to be a principal and permanent residence, makes domicile; and absence from such a place, of a temporary nature, or in the exercise of some particular profession, office, or calling, does not change the domicile. *Ex parte* Kenyon, 385.

DUTY OF STEAMBOATS.

1. As respects spark-arresters, 537.
2. Of guarding elevators, 537.

ELEVATORS. See *Warehouse Receipts.*

EQUITY. See *Chancery; Mortgage; Receiver.*

1. Jurisdiction, in patent causes, 486.
2. Remedy in, against illegal taxation, 445, 449.

ESTOPPEL. See *Attachments*, 2; *Dedication; Municipal Bonds.*

1. Railway mortgage, 1.
2. Replevin for promissory note, *res judicata*, 547.

EVIDENCE. See *Depositions; Warehouse Receipts.*

EXCAVATION IN PUBLIC STREET.

Damages for falling into. See *Damages.*

EXPLOSIVE SUBSTANCES.

Negligence in respect to, 428.

EXTENSION.

Of time of payment, 1.

FACTOR.

DUTY TO OBEY INSTRUCTIONS.—Factors at Kansas City were instructed by their principal to place the proceeds of the sale of property to the credit of the principal in the Exchange Bank, in Denver. The factors deposited the money in a bank at Kansas City, to the credit of the Exchange Bank. The Kansas City bank failed in two days thereafter. In an action by the principal against the factors, *Held*, on the facts appearing in the case, that it was the defendants' duty to have put the money in the Exchange Bank, or to have adopted the usual and ordinary means to effect that end; and having failed to do either, and to show affirmatively that such failure was not the cause of the loss, the defendants were liable. Ernest *v.* Stoller, 438.

FEDERAL AND STATE COURTS. See *Attachments; Bankrupt Law; Municipal Bonds; Removal of Causes; Suits.*

1. As to state attachment laws in. Lehman *v.* Berdin, 340.
   Singer Mfg. Co. *v.* Mason, 488.
2. Where state contains more than one federal judicial district, 382.
3. Jurisdiction of. See *Jurisdiction.*
4. Transfer of counties from one district to another, 392.
5. Power to release on *habeas corpus*, 385.

FORECLOSURE.

Of railway mortgage, 1, 519, 531.

FULL-PAID STOCK.

What is, 45, 348.

GOVERNMENT LAND. See *Patents for Lands.*

1. PRIORITY AS BETWEEN GRANTEES.—Congress in 1866 made a grant of public land to aid in the construction of the St. Joseph and Denver City Railroad on each side of the line of that road for the distance of ten sections. On the 28th of March the railroad company, in pursuance of the statute, filed a map of its line in the office of the secretary of the interior. This map was transmitted to the local government land office, but was not recorded until April 13th. On the 11th of April Cropsey entered a quarter section included in the lands embraced by the map, and a patent was issued to him for the quarter section: *Held*, that the title of the company to the land was valid against Cropsey. Knevals *v.* Hyde, 469.
2. *Same.*—WHO MAY TAKE ADVANTAGE OF FORFEITURE.—The railroad company did not comply with the terms of the statute making the grant: *Held*, that the United States only could take advantage of such failure. *Ib.*

GRAIN ELEVATORS. See *Warehouse Receipts.*

GRANT OF LANDS.

1. To railways, 469.
2. By treaty, 405.

HABEAS CORPUS.

1. POWER TO ISSUE.—By the laws of the United States, the supreme, circuit, and district courts, or the judges thereof, have power to grant the writ of *habeas corpus* within their respective jurisdictions. *Ex parte* Kenyon, 385.

HABEAS CORPUS — Continued.

2. *Same.*—May Issue to Indian Territory.—The Indian country is within the jurisdiction of the western district of Arkansas. A writ of *habeas corpus* issued by the United States court of that district, or the judge thereof, will run in that territory. *Ib.*

3. *Same.*—Jurisdiction in Cases of.—If a person is held in custody in violation of the constitution, laws, or treaties of the United States—it matters not by whom he is held—the courts of the United States, within their respective territorial jurisdictions, have power to issue the writ of *habeas corpus* to inquire into the cause of his imprisonment. *Ib.*

4. *Same.*—When its Jurisdiction will be Exercised.—If a person is held in custody by virtue of the judgment of a court of another jurisdiction, and in violation of the constitution, laws, or treaties of the United States, a federal court will interfere by *habeas corpus* and examine the case so far as may be necessary to ascertain that fact. *Ib.*

5. *Same.*—When Indian may Obtain.—An Indian is a *person* within the meaning of the *habeas corpus* act, and as such is entitled to sue out a writ of *habeas corpus* in the federal courts when it is shown that the petitioner is deprived of liberty under color of authority of the United States, or is in custody of an officer in violation of the constitution or a law of the United States, or in violation of a treaty made in pursuance thereof. United States *v.* Crook, 453.
Ex parte Reynolds, 394.

6. *Same.*—Why Indian Entitled to.—The right of expatriation is a natural, inherent, and inalienable right, and extends to the Indian as well as to the white race. United States *v.* Crook, . 453.

7. *Same.*—Removal of Indians, when Writ will Issue.—The military power of the government may be employed to effect such removal; but where the removal is effected, it is the duty of the troops to convey the persons so removed, by the most convenient and safe route, to the civil authorities of the judicial district in which the offence may be committed, to be proceeded against in due course of law. In time of peace, no authority, civil or military, exists for transporting Indians from one section of the country to another, without the consent of the Indians, nor to confine them to any particular reservation against their will; and where officers of the government attempt to do this, and arrest and hold Indians who are at peace with the government, for the purpose of removing them to and confining them on a reservation in the Indian Territory, they will be released on *habeas corpus.* *Ib.*

INDIAN LANDS.

1. TITLE, HOW.—The Cherokee tribe of Indians hold their lands by a title different from the Indian title — by occupancy. They derived it by grant from the United States. *It is a base, qualified, or determinable* fee, without the right of reversion, but only a possibility of reversion, in the United States. United States *v.* Reese, 405.
2. *Same.*—NOT GOVERNMENT LANDS.—The lands of the Cherokee tribe of Indians cannot, therefore, be held to be "lands of the United States," in the sense of the language used in section 5388 of the Revised Statutes of the United States. *Ib.*
3. *Same.*—CUTTING TIMBER THEREON.—Penal statutes are to be construed strictly. If there is a fair doubt whether the act charged in the indictment is embraced in the criminal prohibition, that doubt is to be resolved in favor of the accused. *Ib.*
4. *Same.*—POWER OF MAKING SALE.—The treaty-making power of the United States can make a sale or grant of land to an Indian tribe without an act of congress. *Ib.*
5. *Same.*—CONSTITUTIONAL LAW.—Congress has no constitutional right to interfere with rights under treaties, except in cases purely political. *Ib.*

INDIANS. See *Cherokee Lands; Habeas Corpus.*

1. STATUS OF.—Indians who maintain their tribal relations are the subjects of independent governments, and, as such, not in the jurisdiction of the United States, within the meaning of the constitution and laws of the United States, because the Indian nations have always been regarded as distinct political communities, between which and our government certain international relations were to be maintained. These relations are established by treaties to the same extent as with foreign powers. They are treated as sovereign communities, possessing and exercising the right of free deliberation and action, but, in consideration of protection, owing a qualified subjection to the United States. *Ex parte* Reynolds, 394.
2. *Same.*—When the members of a tribe of Indians scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States, and, equally with the citizens thereof, subject to the jurisdiction of the courts thereof. *Ex parte* Reynolds, 394.
   Ex parte Kenyon, 385.
3. *Same.*—STATUS OF OFFSPRING.—The condition of the offspring of a union between a citizen of the United States and one who is not a citizen, *e. g.*, an Indian living with his people in a tribal relation, is that of the father. The status of the child in such case is that

INDIANS —Continued.

of the father. The rule of the common law and of the Roman civil law, as well as of the law of nations, prevails in determining the status of the child in such case. *Ex parte* Reynolds, 394.

4. *Same.*—MAY BECOME A CITIZEN OF THE UNITED STATES.—An Indian may abandon his tribe, and, for the purpose of jurisdiction, become a member of the body politic known as citizens of the United States. *Ex parte* Kenyon, 385.
5. *Same.*—REMOVAL OF.—The commissioner of Indian affairs has ample authority for removing from an Indian reservation all persons found thereon without authority of law, or whose presence may be detrimental to the peace and welfare of the Indians. United States *v.* Crook, 453.

INDICTMENT.

Requisites of, under section 5440 of United States Revised Statutes, 58.

INFANT'S DEED.

DISAFFIRMANCE BY SUBSEQUENT CONVEYANCE.—A conveyance of land by a minor is voidable, not void, and where he disaffirms such act after coming of age, by conveying to a third person, the grantee in such subsequent conveyance, though taking the same with notice of the prior deed, is entitled to a decree quieting the title in himself without restoring the consideration paid for the voidable conveyance. Nettleton *v.* Morrison, 503.

INJUNCTION.

Against threatened nuisances, 151.

INTEREST. See *Municipal Bonds; Railway Mortgage.*

INTERNAL IMPROVEMENT BONDS. See *Municipal Bonds.*

IOWA.

1. Cases reported from the district of, 537–573.
2. Borrowing money by municipal corporations in, 556.
3. Statute of as to dedication of land construed, 549.
4. Legislation of as to bonds, 556.

JUDGMENT CREDITORS.

1. RIGHTS OF, UNDER UNRECORDED DEED IN MINNESOTA.—By the statute of Minnesota (Rev. Stats. p. 339, sec. 21), judgment creditors, as respects unrecorded deeds, are put upon the same footing as *bona fide* purchasers for value. Lash *v.* Hardick, 505.
2. *Same.*—POSSESSION NOTICE.—The possession under the unrecorded deed, in this case, was not of such a character as to charge the judgment creditor with notice of the rights of the grantee. *Ib.*

JUDGMENT IN REPLEVIN.

How far conclusive, 547.

JUDGMENT ON COUPONS.

Enforcement of, 285, 310.

JURISDICTION. See *Bankrupt Law; Habeas Corpus*, 4, 5; *Patents; Suits.*

1. NATURE OF.—CONSTITUTIONAL LAW.—The jurisdiction of the federal courts is derived from the constitution and laws of the United States, and the same cannot be enlarged, diminished, or affected by state laws. Such jurisdiction over controversies cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. National Bank of Western Arkansas *v.* Sebastian County, 414.
2. *Same.*—Constitutional law impairing obligation of contracts. See *Contracts.*
3. *Same.*—WHEN DISTRICT IS ENLARGED, WHERE CASES TO BE TRIED.—The act of congress of January 31st, 1877, taking certain counties out of the western district and placing them in the eastern district of Arkansas, is silent as to cases then pending in the western district against residents of these several counties; such cases remain and are to be tried by the United States court for the western district. Culver *v.* Woodruff County, 392.
4. *Same.*—STATUS OF PARTIES WHEN IT WILL NOT DEPRIVE COURT OF.—Where the status of parties is such as to give a federal court jurisdiction, a change of such status pending the suit does not affect the jurisdiction. *Ib.*
5. *Same.*—In equity, of suits for damages for infringements, 561.

KANSAS.

1. Cases reported from district of, 473–494.
2. Attachment bond in, sureties on, 488.
3. Conflict of laws, contract, 482.
4. Rights of settlers on Cherokee lands, 491.

LAND GRANTS.

1. To railways, 469.
2. By treaty, 405.

LANDS OF THE UNITED STATES. See *Indian Lands; Patents for Lands.*

LIABILITY.

1. Of factor, 438.
2. Of municipal corporations on bonds issued for illegal scrip, 299.
3. Of stockholders, 45.
4. Of warehousemen, 428.

LIMITATION OF ACTIONS. See *Bankrupt Law.*

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When a nuisance, remedy by injunction, 151.

MACHINE SHOPS.

Bonds of municipalities in aid of, 253.

MANDAMUS. See *Municipal Bonds; Removal of Causes.*

1. To enforce judgment, 285, 310.
2. To levy tax, 285, 310.
3. Suit removable to federal court, 489.

MINNESOTA.

1. Cases reported from district of, 494–536.
2. Municipal corporations, powers of in, 498.

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Conveyance by, 504.

MISSOURI.

1. Cases reported from eastern district of, 1–252.
2. Cases reported from western district of, 253–298.
3. Power of corporations to borrow money in, 165.
4. Constitutional provisions construed, 253.
5. Municipal bond law in. See *Municipal Bonds.*
6. Bonds to aid in erecting machine shops, 253.
7. Chattel mortgages, 117, 119.
8. Constitutionality of township bond act, 112, 281.
9. Rights of judgment creditors in, 184.
10. Interest on bonds, 219.
11. Non-negotiable bonds in, 265.
12. Statutory regulation as to taxes, 310.
13. Removal of causes, suit at law or in equity, what is, 223.
14. Railroad aid bonds, legislation in, 184.

MORTGAGE. See *Railway Mortgage.*

As to foreclosure, extension of time of payment, estoppel, waiver of payment at the day, default, covenant to pay prior mortgages, principal, interest, amount of decree, see Union Trust Company *v.* Railway Company, 1.

MUNICIPAL BONDS. See *Municipal Corporations*, 1–5.

1. Validity of.—Municipal bonds must be issued for a *public* purpose, or they are void. Jarrott *v.* Moberly, 253.
2. *Same.*—Constitution of Missouri Construed.—Constitutional provision as to "loan of credit" by municipalities to railway corporations (article 11, section 14, constitution of Missouri of 1865), construed. *Ib.*

MUNICIPAL BONDS — Continued.

3. *Same.*—VALIDITY OF BONDS IN AID OF MACHINE SHOPS.—Bonds issued under legislative authority in Missouri to aid a railroad company in erecting "machine shops" are, it seems, bonds issued for a public purpose. *Ib.*
4. *Same.*—But the act authorizing such bonds must comply with section 14 of article 11 of the constitution, which requires the sanction of a *two-thirds* vote. As the act of March 18th, 1870, authorized the issue of "machine shop bonds" in aid of a railroad company on the sanction of a *majority* vote, it is, in this respect, unconstitutional (KREKEL, J., dissenting). *Ib.*
5. *Same.*—CIRCUIT COURTS MUST FOLLOW DECISIONS OF UNITED STATES SUPREME COURT.—The supreme court of the United States having held the "township railroad act" of Missouri constitutional (*Cass County* v. *Johnson*, 95 U. S. 360), it is the duty of the circuit court to follow that judgment, notwithstanding the later decision of the supreme court of Missouri to the contrary. Westermann *v.* Cape Girardeau County, 112.
Foote *v.* Johnson County, 281.
6. *Same.*—CONFLICTING DECISIONS OF STATE AND FEDERAL COURTS.—Where negotiable commercial securities are issued and negotiated *before* there is any decision by the courts of the state against the validity of the act authorizing their issue, the supreme court of the United States does not consider itself bound to follow a *subsequent* decision of the local courts invalidating such securities, but will decide for itself whether, under the constitution and laws of the state, such securities are valid or void. Foote *v.* Johnson County, 281.
Westermann *v.* Cape Girardeau County, 112.
7. *Same.*—ESTOPPEL BY RECITALS IN BONDS.—Bonds, under the seal and signed by the proper officers of the county, payable to bearer, and containing a recital that they are issued pursuant to a vote of the people of the county, are presumptively valid, although the particular purpose for which the bonds were voted is not therein stated.
Carpenter *v.* Buena Vista County, 556.
Westermann *v.* Cape Girardeau County, 112.
8. *Same.*—JUDGMENT CREDITORS, RIGHTS OF IN MISSOURI.—Judgment creditors of counties in Missouri are entitled to the levy of a special tax to pay judgments obtained on railroad aid bonds, if the county cannot or does not otherwise provide the means of payment.
United States *v.* Lincoln County, 184.
9. *Same.*—COTTEY ACT OF 1879 AS TO JUDGMENTS UNCONSTITUTIONAL.—The act of the general assembly of Missouri of March 8th, 1879, known as the "Cottey act," if applicable to such judgments, is, as to bonds issued prior thereto, in conflict with the provision of the constitution of the United States, which prohibits the states from impairing the obligation of contracts. *Ib.*

MUNICIPAL BONDS — Continued.

10. *Same.*—ENFORCEMENT OF JUDGMENT BY MANDAMUS.—A judgment of the court upon the bonds of the county issued in aid of a railroad company may be enforced by a *mandamus* to compel the levy and collection of taxes; or, if the amount is already in the county treasury, applicable to such debts, to compel the county court to draw a warrant to pay the judgment. (See, also, cases in note.) United States *v.* Buchanan County, 285.
United States *v.* Jefferson County, 310.

11. *Same.*—LEVY OF TAXES TO ENFORCE JUDGMENT.—Such a duty is not judicial. (*State* v. *Walker* commented on.) United States *v.* Buchanan County, 285.

12. *Same.*—REMEDY FOR FAILING TO ENFORCE JUDGMENT.—Where two out of three judges of the county court refused to obey a peremptory writ of *mandamus*, they were ordered to return the writ into court, with a sworn return thereon, and also to show cause why they should not be attached for contempt. *Ib.*

13. *Same.*—INTEREST ON BONDS AND JUDGMENTS THEREON.—On matured bonds and coupons of a Missouri municipal corporation, interest is allowable upon bonds payable in New York calling for ten per cent until payment, in accordance with the terms of the contract, at ten per cent, and under the Missouri statute so much of the judgment as relates to the principal of the bonds and accrued interest thereon must continue to bear interest at that rate; upon coupons payable in New York and expressing no rate of interest, the statute of Missouri governs, and only six per cent is allowable, and so much of the judgment as relates to such coupons and accrued interest thereon must continue to bear that rate of interest. Fauntleroy *v.* City of Hannibal, 219.

14. *Same.*—LIABILITY ON BONDS ISSUED TO TAKE UP ILLEGAL SCRIP.—The city of Little Rock, in payment of valid debts against the city, issued bonds in the similitude of bank-bills, in violation of statutes of the state, one of which prohibited the *making or receiving* of such paper. Afterwards the city called in and cancelled these illegal bonds, and issued in their place other bonds, which were unobjectionable in form: *Held*, that the city was liable on these latter bonds to holders thereof who had not participated in the issue of the illegal bonds, although they had notice of all the facts of the transaction. Merchants' National Bank *v.* Little Rock, 299.

15. *Same.*—LIABILITY ON BONDS FOR THE ACTUAL MONEY PAID AND INTEREST.—A municipal corporation issued bonds valid on their face, but in fact void, because they were antedated to evade the registration act, and were not registered; the corporation had power to borrow money, and the proceeds of the bonds passed into the city treasury and were used for lawful purposes: *Held*, that the corporation was liable in an action for money had and received to the purchaser of

MUNICIPAL BONDS — Continued.

the bonds or his assignee, not for the amount of the bonds, but for the amount of money actually paid for the bonds to the corporation, with simple interest thereon. Wood *v.* City of Louisiana, 122. See *Municipal Corporations*, 4.

16. *Same.*—When not Negotiable so as to Preclude Defence against a Holder for Value.—The bonds in suit, not being promises to pay money absolutely, are not negotiable, and are, therefore, open, in the hands of any holder, to defences which would have been available against the payee. Merriwether *v.* Saline County, 265.
17. *Same.*—Recital of Convertibility Makes it Non-Negotiable.—A *township* bond contained a statement that "it is to be converted into a *county* bond" whenever a certain injunction shall be finally dissolved. County bonds issued under the order enjoined, not being promises to pay money absolutely, but a stipulation for bonds thereafter to be issued, are not negotiable in such a sense as to preclude the maker from defences, although held by the plaintiff for value before due, and without actual notice of the maker's defences. *Ib.*
18. *Same.*—The cases of *Foster* v. *Calloway County* (3 Dillon, 209), and *Sherrard* v. *Lafayette County* (*Ib.* 236) cited. *Ib.*
19. *Same.*—Recital in Bonds, cuts off Defences.—The bond sued on in this case being in the hands of a *bona fide* holder, containing a recital on its face that it was issued to pay for a subscription to the Cape Girardeau and State Line Railroad, the county cannot be heard to say that the subscription therein specifically recited was not made. The fact that in this case the requirement of a two-thirds vote is contained in a provision of the constitution instead of being a legislative enactment, makes no difference in principle. Westermann *v.* Cape Girardeau County, 112.
20. *Same.*—Statute Authorizing Levy of Special Tax becomes Part of the Obligation.—Where a statute authorizes a county to issue its negotiable bonds, and makes it the duty of the county court "to levy a special tax of sufficient amount to pay the interest and principal of said bonds as the same become due," the power of taxation thus given enters into and becomes a part of the obligation of the contract between the county and every holder of such bonds; and, under the constitution of the United States, this obligation of the contract cannot be impaired or lessened in any degree by the constitution or laws of the state afterward enacted. United States *v.* Jefferson County, 310.
21. *Same.*—Taxes to Pay such Bonds may be Compelled by Mandamus. —In such case, it is the duty of the county court to levy and cause to be collected a tax sufficient in amount to pay the interest and principal of such bonds as the same mature, and if it does not perform this duty it may be compelled to do so by *mandamus*. *Ib.*

MUNICIPAL BONDS — Continued.

22. *Same.*—SUBSCRIPTION TO.—A municipal corporation cannot subscribe to the capital stock of a railroad company, and issue its bonds in payment of such subscription, unless the power so to do has been expressly conferred by law. Lewis *v.* City of Clarendon, 329.
23. *Same.*—CONSOLIDATION.—When two or more railroad companies are consolidated, the consolidated company succeeds to and possesses all the franchises, rights, privileges, and immunities of the several companies of which it was formed. *Ib.*
24. *Same.*—TRANSFER OF SUBSCRIPTION.—The right granted to a railroad company by its charter to receive municipal subscriptions to its capital stock, payable in bonds, is a right and privilege that, upon its consolidation with another company, passes to the consolidated company. *Ib.*
25. *Same.*—ESTOPPEL.—Where a city subscribes to the capital stock of a railroad company formed by the consolidation of two or more companies, and issues its bonds to such company in payment of the subscription, in a suit upon the bonds the city is estopped to deny the corporate existence of the company so formed, or the validity of the proceedings for the consolidation. *Ib.*
26. *Same.*—INTEREST.—If, in the exercise of its undoubted powers, a corporation makes a contract, some stipulation of which is in excess of its powers, this does not avoid the whole contract, if, after rejecting such stipulation, there remains a good execution of the powers granted; and if a corporation having authority to issue bonds "bearing interest at the rate of six per cent," issue them bearing ten per cent, they are valid obligations for the principal and six per cent interest. *Ib.*
27. *Same.*—INTEREST.—Where a statute prescribes a rate of interest, and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Ib.*
28. *Same.*—LIMITATIONS ON RIGHT.—Where authority is given "to any incorporated town or city" in a county to subscribe to the capital stock of a railroad company, such authority is not limited to towns and cities incorporated at the date of the passage of the act. *Ib.*

MUNICIPAL CORPORATIONS. See *Municipal Bonds.*

1. POWER TO BORROW MONEY.—Whether a municipal corporation possesses the power to borrow money, and to issue negotiable securities therefor, depends upon a true construction of its charter and the legislation of the state applicable to it. Gause *v.* City of Clarksville, 165.
2. *Same.*—POWER TO BORROW MONEY, WHEN IMPLIED.—It has no incidental or inherent authority under the usual grants of municipal powers as a means of discharging its ordinary municipal functions.

MUNICIPAL CORPORATIONS — Continued.

Such authority may be inferred from special and extraordinary powers, which require the expenditure of unusual sums of money, when it is usual to execute such powers by means of borrowing, and when, upon the whole legislation applicable to the municipality, such appears to have been the legislative intent. *Ib.*

3. *Same.*—Application of the Doctrine.—These principles applied, and coupon bonds to borrow money to erect and repair wharves and to open streets, issued under the general grants of municipal power in the charter, were held not to be binding upon the city, while other bonds, issued under a special act of the legislature, in payment of stock in companies organized to construct macadamized roads from the city, were held to be valid. *Ib.*
4. *Same.*—Remedy of Holder of Bonds.—Where bonds of a city are issued without authority for money borrowed and actually received by the city, the remedy against the city is not by an action on the bonds, but to recover the money. *Ib.*
Wood *v.* City of Louisiana, 122.
5. *Same.*—Doctrine in Iowa, under Statute.—Under the legislation of Iowa, counties have the power to issue negotiable securities for borrowed money to aid in specified public improvements therein, or to meet extraordinary expenditures, if previously authorized by a vote of the people, but not otherwise. Carpenter *v.* Buena Vista County, 556.
6. *Same.*—Power to Settle Disputed Claims.—Municipal corporations with power to make contracts, and to sue and be sued in respect thereto, may, in the absence of special legislative restriction, compromise a disputed claim, and the settlement is binding on the municipality and its taxpayers, unless it can be impeached for fraud. Warren *v.* St. Paul, 498.
7. *Same.*—Doctrine Applied to the City of St. Paul.—The city of St. Paul possesses this power, and it is not restricted by the creation of the board of public works. *Ib.*
8. *Same.*—Remedy of Taxpayer.—A taxpayer cannot overhaul or question the settlement, fairly made by a municipal corporation, of a disputed claim arising under a contract not *ultra vires*. *Ib.*

NEBRASKA.

1. Cases reported from district of, 443–472.
2. Revenue laws of, 449.

NEGLIGENCE.

1. As to negligence causing fire, remote and proximate cause, construction of steam engine as respects damages caused by sparks, duty of steamboats as respects spark-arresters, duty of guarding elevators, 531.

NEGLIGENCE—Continued.

2. Of railroad company as warehousemen, 428.
3. Injuries to child by excavation in street, 96.

NEGOTIABLE PAPER.

Validity and effect of stipulation in note for attorney's fees, 482.

NUISANCE.

1. A LIVERY STABLE, WHEN IT IS NOT.—A livery stable in the residence portion of a city is not, as a matter of law, necessarily to be considered as a nuisance to the improved property adjoining or near it. Flint *v.* Russell, 151.
2. *Same.*—WHEN AN INJUNCTION WILL BE REFUSED TO RESTRAIN ERECTION OF.—Where the facts stated in the bill showing that the erection and use of a livery stable would be a nuisance to the adjoining property were denied by the answer, a preliminary injunction to restrain the *erection* of a building to be used as a livery stable was refused. *Ib.*

OBLIGATION OF CONTRACTS. See *Municipal Bonds.*

Laws impairing, 310.

OBSCENE BOOKS, LETTERS, ETC.

The act of congress of July 12th, 1876 (19 Stats. at Large, 90), in respect to mailing obscene books, etc., construed, and *held* not to extend to the case of a sealed letter written by the defendant to a person who had no existence, in answer to a decoy letter of a detective, and which on its face gives no information of the prohibited character. United States *v.* Whittier, 35.

PARTITION.

1. REMEDY OF PART OWNERS OF A STEAMBOAT.—In case of a dispute between part owners of a steamboat as to her employment, a court of admiralty will not decree a sale of the whole boat at the instance of the minority interest. Lewis *v.* Kinney, 159.
2. *Same.*—STIPULATION FOR USE OF BOAT BEFORE PARTITION.—Nature of the stipulation which the majority interest, wishing to employ the boat, may be required to give for the protection of the minority interest, discussed. *Ib.*

PARTNERSHIP.

1. Adjudication of, as bankrupts, 565.
2. Parties, dormant partner, 565.

PATENTS FOR INVENTIONS.

1. Assignment of Right to Recover for Infringements.—A patentee may assign his right to recover for infringements occurring before the assignment. Hamilton *v.* Rollins, 495.

2. *Same.*—Rights of Assignee.—The assignment by the patentee to the plaintiff, set out in the bill, held to give the latter the whole benefit of the invention, including any extended term. Sayles *v.* Railroad Company, 561.

3. *Same.*—Extension of Patent.—The patent in question held, on demurrer, to have been extended at the instance and for the benefit of the inventors. *Ib.*

4. *Same.*—Jurisdiction in Equity as Accounting for Profits.—Equity has jurisdiction of a bill by a patentee against an infringer which seeks a discovery and account of profits. Stevens *v.* Kansas Pacific Railway Company, 486.
Sayles *v.* Railroad Company, 561.

5. *Same.*—Equitable Jurisdiction after Expiration of Patent.—Such suits, when otherwise maintainable, are of equitable cognizance, although no injunction has issued, and although brought after the expiration of the original or extended term of the patent. Sayles *v.* Railroad Company, 561.

6. *Same.*—Limitations under Act of Congress Applied.—The act of congress of 1870, section 55, as to limitation of actions for infringements of patents, construed, and held to bar any claim in respect of the original patent. *Ib.*

7. *Same.*—Quære whether State Statute of Limitations Applies.—Whether state statutes of limitation are applicable to suits by a patentee of an invention against an infringer to compel the latter to account for profits, *quære?* Stevens *v.* Kansas Pacific Railway Company, 486.
Sayles *v.* Railroad Company, 561.

8. *Same.*—Profits, when not Liable for.—The defendant company is not liable for the profits made by a predecessor company. Sayles *v.* Railroad Company, 561.

9. *Same.*—Valid Patent.—Letters-patent No. 51,310, to Palmer Hamilton, for "improvement in saw-mills," is valid, and was not anticipated by the Staub patent, No. 7,943. Hamilton *v.* Rollins, 495.

10. *Same.*—Void Patent.—Purification of Middlings.—The Cochrane reissued patent, sustained in *Cochrane* v. *Deener* (94 U. S. 780), for the manufacture of new process flour by the purification of "middlings" by screening and blowing, was held void because no such process was described, suggested, or claimed in the original patent. Middlings Purifier Company *v.* Milling Company, 127.

PATENTS FOR LANDS. See *Government Land.*

1. When Courts will not Interfere with Issue of.—The courts will not interfere with the land department of the general government by restraining the issue of patents or other evidences of title; the complainant must wait until the land department has acted, and then attack the results of such action in a proper judicial proceeding against the person who has improperly acquired the title from the government. Leitensdorfer *v.* Campbell, 419.
2. *Same.*—When a Case for Relief is Presented.—Congress confirmed, with a reduced area, an inchoate Mexican grant (12 Stats. at Large, 71), and provided that the original and derivative claimants (15 Stats. at Large, 275) should *establish their claims to the satisfaction of the register and receiver of the proper land district.* It seems that an appeal lies from the decisions of these officers to the commissioner of the general land office, the same as in ordinary cases. It was held that a bill which alleges that the land department refused to hear the complainant's appeal, and, instead thereof, had issued patents to the respondent, to the plaintiff's injury, and that the decision of the register and receiver had been procured by bribery practised by the respondent, presented a *prima facie* case for relief. *Ib.*
3. *Same.*—Rights of Claimants Discussed.—Rights of the derivative claimants of the Vigil and St. Vrain grant, under the act of June 21st, 1860 (12 Stats. at Large, 71), and of February 25th, 1869 (15 Stats. at Large, 275), discussed. *Ib.*

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As to obscene literature construed. United States *v.* Whittier, 35.

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1. Of municipality to settle disputed claims, 498.
2. Of federal courts in *habeas corpus*, 385.
3. Of sale in chattel mortgage, 117.

PRACTICE. See *Attachments; Chancery; Depositions; Municipal Bonds; Suits.*

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RAILROAD COMPANY. See *Government Land; Municipal Bonds; Receiver.*

1. Construction Contract.—Full-Paid Stock.—Where, under its charter, the directors of a railroad company issued shares of stock to a contractor for building its road, as full-paid shares (which contract was never questioned by shareholders or by creditors as being either fraudulent or *ultra vires*), and such shares were sold by the contractor, in the public market, as full-paid shares, to purchasers for value, without actual notice of the equities between the contractor and the company, the holders of such shares are not subject to such equities, or liable to have the shares thus issued and thus purchased treated as unpaid shares. Steacy *v.* Little Rock Railroad Company, 348.
2. *Same.*—Acquiescence in Release of County Subscription.—The agreement of the company, sanctioned by the stockholders, made when the company was solvent, and acquiesced in and acted on for seven years, to release certain counties from the payment of the balance of their stock subscriptions, was, under the circumstances, held valid. *Ib.*
3. *Same.*—Liability of Stockholders.—Construction of Charter.—The charter of the Little Rock and Fort Smith Railroad Company provided that no stockholder therein should be liable for losses to any greater amount than the whole amount of stock subscribed for or taken by him, and that the charter should not be altered or amended except by the consent of the majority of the stockholders. Subsequently the constitution of the state provided for a *double* liability on the part of all stockholders in corporations; but the provisions of the constitution were never accepted by the stockholders: *Held*, that the measure of liability of the stockholders at whatever time they became such, is that fixed by the charter, and was not increased by any subsequent act of the state not assented to by the corporation. *Ib.*
4. *Same.*—Whether the constitutional provision was self-executing, *quære?* *Ib.*
5. *Same.*—Remote and Proximate Cause.—Negligence Causing Fire.—The defendant was the owner of an elevator built on the bank of the Mississippi river, and also of a steamboat used in transferring cars and barges to and from it. The steamboat had no spark-arrester, and the exhausted steam was allowed to escape through its chimney. The plaintiff was the owner of a mill and a lumber yard, the former five hundred and twenty-eight and the latter

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